Supreme Court, U. S.
FILED
SEP 25 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1976

No. 76-441

RIEGEL TEXTILE CORPORATION,
Petitioner,

v.

CENTRAL OF GEORGIA RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

JAMES E. CLARK
LONDON, YANCEY, CLARK & ALLEN
Suite 2100
First National-Southern Natural Building
Birmingham, Alabama 35203
205-251-2531
Attorneys for Petitioner

September 27, 1976

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
I. Opinions Below	2
II. Jurisdiction	3
III. Grounds for Invoking the Jurisdiction of the Supreme Court	4
IV. Questions Presented for Review	5
V. Constitutional Provisions, Statutes and Rules of Procedure Involved	6
VI. Statement of the Case and Basis for Federal Jurisdiction of Court in First Instance	10
VII. Argument for Allowance of Writ of Certiorari	26
A. Were FELA Standards Due to Be Applied Herein and, if So, Against Whom and in What Sense?	26
(1) The Effect of Applying FELA Principles of Proof to This Case	33
(2) The Effect of Applying FELA Rather Than Common Law Negligence to This Case	37
B. Was Not Petitioner, Under Erie, Entitled to Have Favorable Georgia Law Applied in This Case?	40
C. Has the Fifth Circuit Departed Drastically From the Accepted and Usual Course of Judicial Proceedings by Its Affirmance of This Case?	53
Conclusion	59

INDEX OF ADDENDA

Appendix "A"	A-1
Appendix "B"	A-13
Appendix "C"	A-24
Appendix "D"	A-31
Appendix "E"	A-58

Cases Cited

Atlantic Coast Line R. Co. v. Dixon, 189 F.2d 525 (1951) 38

Atlantic Coast Line v. Robertson, 214 F.2d 746, 4th Cir. 1954 27

Boeing v. Shipman, 411 F.2d 365 (1969) ..30, 31, 36, 57, 58

Booth-Kelly Lbr. Co. v. Southern Pacific RW Co., 183 F. 2d 902, 9th Cir. 1950 .....27, 41

Central of Georgia Railway Company v. J.P. Steed, 287 Ala. 64, 248 So.2d 110 .....3, 12, 18, 51, 52

Central of Georgia Railway Company v. Riegel Textile Corporation, 426 F.2d 935 (5th Cir. 1970) 3, 12

Cheffey v. Penn. R. Co., 79 F.Supp. 252 50

Chicago & N.W. Ry. Co. v. Rieger, 326 F.2d 329 (1964) 39

Chicago R.I. & P.R. Co. v. Dobry Flour Mills, Inc., 211 F. 2d 785 (1954) 41

Colonial Stores, Inv. v. Central of Georgia RR Co., 279 F.2d 777, 5th Cir. 1960 .....27, 41, 42, 43

Davis v. Virginia RW Co., 361 U.S. 354, 80 S.Ct. 387 ... 29

Ellis v. Union Pac. R. Co., 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572 38

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 .....49, 52

Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 77 S.Ct. 457 29

Freed v. Great Atlantic & Pacific Tea Co., 401 F.2d 266, 6th Cir. 1968 27

Galloway v. U. S., 319 U.S. 372, 63 S.Ct. 1077 57

Gross v. Sou. R. W. Co., 414 F.2d 292 (1969) 45

Gusee v. Kaley, 449 F.2d 1276 (1971) 40

Harris v. Penn. RR Co., 361 U.S. 20, 80 S.Ct. 22 29

Ill. Cent. RR Co. v. Standard Oil Co., 292 F.Supp. 337, affmd. 403 F.2d 1022, 5th Cir. 1968 45

Jamison v. Encarnacion, 281 U.S. 635, 50 S.Ct. 440 ... 38

Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740 32

McGivern v. Northern Pac. Co., 8 Cir., 132 F.2d 213, 217 38

Miller v. Cincinnati, N.O. & Texas-Pacific Ry. Co., 317 F.2d 693, 6 Cir. 1963 47

Miller v. Robertson, 266 U.S. 243 39

Missouri-Pac. R. Co. v. Aeby, 275 U.S. 426, 48 S. Ct. 177, 72 L.Ed. 351 38

Missouri-Pacific RR Co. v. Arkansas Flooring Co., 434 F.2d 575, 8th Cir. 1970 .....27, 42

Nivens v. St. Louis & Southwestern Ry. Co., 425 F.2d 114 (5th Cir. 1970) 35, 47

O'Brien v. Westinghouse Elec. Corp., 293 F.2d 1 53

Patterson v. Norfolk & Western Ry. Co., 489 F.2d 303, 6 Cir. 1973 46

Penn. RR Co. v. Erie Ave. Warehouse Co., 302 F.2d 843, 3rd Cir. 1962 .....27, 41, 44

Planters Mfg. Co. v. Protection Mut. Ins. Co., 380 F.2d 869 (5th Cir. 1967) 31

Ratigan v. N. Y. Cent. RR. Co., 291 F.2d 548 50

Reid v. Penn. RR Co., 351 U.S. 502, 76 S.Ct. 958 29

Rogers v. Missouri-Pacific R. Co., 352 U.S. 500, 77 S.Ct. 443 .....32, 35

Rouse v. Chicago, Rock Island & Pacific RR Co., 474 F. 2d 1180, 8th Cir. 1973 .....27, 41

Seago v. New York Central R. Co., 315 U.S. 781, 62 S.Ct. 806 29

Security Ins. Co. of New Haven v. Johnson, 276 F.2d 182, 10th Cir. 1960 ..... 27, 40

Siegrist v. Delaware, Lackawanna & Western RR Co., 263 F.2d 616 (1959) 39

Southern Pac. v. Gileo, 351 U.S. 493, 76 S.Ct. 952 29

Steed v. Central of Georgia Railway Company, 477 F.2d 1303 ..... 3, 12, 13, 18, 56

Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 64 S. Ct. 409 32

Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S. Ct. 444, 87 L.Ed. 610 38

Tippen v. Petty, 7 Porter 441 50

Trawick v. Manhattan Life Ins. Co., 447 F.2d 1293 (1971) 58

United States v. Bryan, 265 F.2d 698, 5th Cir. 1959 57

Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018 38

USF&G v. Miller, 235 Ala. 340, 179 So.2d 239 50

U. S. v. Seckinger, 397 U.S. 204, 90 S.Ct. 880 28

Wanser v. Long Island RR Co., 238 F.2d 467 (1956) ... 33

White v. Jackson, 36 Ala. App. 643, 62 So.2d 477 50

Wilkerson v. McCarthy, 336 U.S. 53, 69 S.Ct. 413 .....29, 32

Wilson v. Dudley, 76 So.2d 509 50

Statutes Cited

Georgia Code, Sec. 105-603 45

28 USCA, Sec. 51 .....27, 30

28 USC, Sec. 1254(1) 3

45 USC, Sec. 1, et seq. 4, 6

Rules Cited

Federal Rules of Appellate Procedure, Rule 41(b) 4

Federal Rules of Civil Procedure, 41(b), 50(a), 50(b), 52(a), 56 .....7, 8, 56

Supreme Court Rule 19, Para. 1(b) 4

Constitution

United States Constitution:

Amendment V 9

Amendment VII 9

Texts Cited

Black's Law Dictionary, p. 1184 37

Cyclopedia of Federal Procedure, Vol. 13, § 60.159 49

Wright and Miller, Federal Practice and Procedure, Vol. 9, §§ 254, 2526 .....22, 58

IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1976

No. .....

RIEGEL TEXTILE CORPORATION,
Petitioner,

v.

CENTRAL OF GEORGIA RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNTED STATES

Riegel Textile Corporation (hereinafter "Riegel"), Petitioner herein, prays that a write of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on April 5, 1976 and mandated on July 6, 1976 after denial of Riegel's Petition for Rehearing and for Rehearing En Banc on June 28, 1976.

Said final judgment was rendered in respect to Riegel's appeal of a judgment in favor of the Respondent, Central of Georgia Railway Company (hereinafter "Central") entered in said cause by the United States District Court for the Northern District of Alabama, Southern Division, on July 16, 1976 with Memorandum Opinion of said District Court also being filed on said date, in addition to a separate order denying Riegel's Motion for judgment in its favor and alternatively to limit Central's recovery, if any, to a sum not in excess of one-half of the indemnity claimed by it.

I

OPINIONS BELOW

(1) The Opinion of the Court of Appeals for the Fifth Circuit rendered on April 5, 1976 and sought to be reviewed on Certiorari herein has been published under the caption: *"Steed v. Central of Georgia Railway Company"*, at 529 F.2d 833. A verbatim copy of the same is included in the Addenda hereto as Appendix "A" beginning at Page A-1. The Memorandum Opinion of the United States District Court for the Northern District of Alabama entered on July 16, 1974 giving rise to the appeal of this case has not been reported officially or unofficially and a copy of the pertinent portions thereof is incorporated in the Addenda hereto as Appendix "B", beginning at Page A-13. *It does not include the Trial Judge's Summary of the Evidence which is the basis of said Court's unauthorized "Findings of Fact" in a jury case.* Said Summary is set out, however, under Footnote 1 to the Fifth Circuit's Opinion in *Steed v. Central*, supra, and contained in Appendix "A" above mentioned.

(2) The Opinion of the Fifth Circuit sustaining the removal of this case by Riegel to Federal Court is to be found under the

caption *"Central of Georgia Railway Company v. Riegel Textile Corporation"* at 426 F.2d 935. A copy of said Opinion is not included herewith for that, although interesting, it had no bearing on the issues here.

(3) The Opinion of said Circuit Court of Appeals reversing summary judgment granted by the District Court in favor of Central is to be found under the caption *"Steed v. Central of Georgia Railway Company"* at 477 F.2d 1030. Copy of the same is included in the Addenda as Appendix "C" beginning at Page A-24.

(4) The Opinion of the Alabama Supreme Court affirming the judgment of its Trainman, J. P. Steed, against Central in an FELA suit brought in the Circuit Court of Jefferson County, Alabama, and for which the Railroad sought indemnification against Riegel under a Spur Track Agreement in this action is published as *"Central of Georgia v. Steed,"* 287 Ala. 64, 248 So.2d 110. A copy of said Decision is incorporated in the Addenda hereto as Appendix "D" beginning at Page A-31.

II

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on Aprli 5, 1976 in accordance with the Court's Opinion filed the same date. The Petition of Riegel Textile Corporation for Rehearing and Rehearing En Banc was denied June 28, 1976 and mandated as a final judgment as of July 6, 1976.

The statutory provision conferring on the Supreme Court jurisdiction to review the judgment in dispute by writ of Certiorari is 28 USC, Sec. 1254(1) An Order staying the mandate to and including September 4, 1976 was issued on August 9,

1976 by the Fifth Circuit pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure and another Order extending the stay of mandate to and including September 26, 1976 was issued by said Circuit on September 3, 1976.

III

GROUNDS FOR INVOKING THE JURISDICTION OF THE SUPREME COURT

Petitioner submits as the basis on which it suggests that this Court may review the Opinion of the Fifth Circuit dated April 5, 1976 hereinbefore referred to and pursuant to Supreme Court Rule 19, Para. 1(b), the following grounds, separately and severally, to-wit:

(a) The Decision of the Fifth Circuit above mentioned is in conflict with the Decisions of other Courts of Appeal, as well as its own Decisions on the same matter and in connection with questions of substantial importance which it is in the public interest to have decided by the Supreme Court of the United States.

(b) Said Opinion of the Fifth Circuit decides important questions of Georgia law in a way to conflict with applicable Decisions of the Appellate Courts of said State.

(c) The Fifth Circuit has decided an important question of Federal law relating to the application of the Federal Employers Liability Act, 45 USC, Sec. 1, et seq., which has not been, but should be, settled by the Supreme Court.

(d) The Fifth Circuit has in its Opinion aforementioned decided said questions in a way which conflicts with Decisions of the Supreme Court relating to the Federal Employers Liability Act, supra, and the application of its standards.

(e) The Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower Court in such manner as to call for an exercise of the power of supervision of the Supreme Court.

IV

QUESTIONS PRESENTED FOR REVIEW

1. **Is the Decision of the Court of Appeals for the Fifth Circuit Entered on April 5, 1976 Correct in Its Imposition of the Standards of the Federal Employers Liability Act, Title 45, Sec. 51, USC, Relating to What Constitutes Negligence and the Sufficiency of Proof Thereof to Sustain a Directed Verdict in a Diversity Action Brought by a Railroad Against an Industry for Indemnity Under a Sidetrack Agreement Between Such Parties Executed in Georgia, Contemplated to Be Performed in Said State, and in a Situation Wherein the Loss Which the Railroad Seeks to Recover Occurred on the Industry's Premises in Georgia?**

(a) Is there really any difference in FELA concepts of negligence under the Federal Employers Liability Act and common law concepts of negligence?

(b) If FELA principles of proof of negligence and the sufficiency of evidence concerning the same to support the grant of a Motion for Directed Verdict are to be applied in a suit on a Sidetrack Agreement by a Railroad against an Industry, are they due to be limited to alleged "acts and omissions" of the latter or should their application also be referable to the contended "joint and concurring negligence" of the former?

2. **Is It a Departure From the Accepted and Usual Course of Judicial Proceedings Sufficient to Invoke the Power of Supervision of the Supreme Court for a District Judge to Direct a Verdict in Favor of a Plaintiff on the Same Evidence Previously Adjudicated as Insufficient to Warrant Summary Judgment Against a Defendant and in Connection Therewith for the Court to Make Findings of Fact and Enter Conclusions of Law in a Non-Jury Case?**

(a) If, upon review, a Court of Appeals determines that a summary judgment against a defendant should not have been granted for that on the Record relating thereto the burden of showing a "*genuine issue of fact*" was not discharged, can the Trial Judge's subsequent direction of a verdict in favor of the plaintiff on substantially the same evidence be correctly affirmed?

(b) Upon the appeal of a District Court's judgment in favor of a plaintiff in response to its Motion for a Directed Verdict, is the Court of Appeals entitled to base its review upon the Findings of Fact of the Trial Judge in a jury case in lieu of affording the Defendant-Appellant every reasonable inference in its favor to be drawn from all of the evidence and by application of the "*reasonable Man Rule*" thereto?

V

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PROCEDURE INVOLVED

The Decision of the Fifth Circuit sought to be reviewed herein on Certiorari involves the interpretation of Title 45, Sec. 51, USC, popularly known as the "Federal Employers Liability Act" and its application to the rights and liabilities of a Railroad and an Industry under a Sidetrack Agreement

between such parties. Pertinent provisions of said Act are as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The Opinion of the Fifth Circuit also involves the manner in which certain Federal Rules of Civil Procedure were employed by the District Judge and the affirmance of his action in such regards by the Court of Appeals, namely Rules 41(b), 50(a) and (b), 52(a) and 56, the relevant portions of said Rules being as follows:

> **"Rule 41. Dismissal of Actions:**
>
> * * *. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court, as trier of the facts, may then determine them and render judgment against the piaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a) * * *."
>
> **"Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.**

(a) *Motion for Directed Verdict; When Made, Effect.*

* * *. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) *Motion for Judgment Notwithstanding the Verdict.*

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. * * *. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

"Rule 52. Findings by the Court.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; * * *. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

"Rule 56. Summary Judgment.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of an action, or after service of a motion for summary judgment by the adverse party,

move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

* * * * * * *

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

* * * * * * *

It is also the contention of Petitioner that its Constitutional rights under the Fifth and Seventh Amendments have been violated in the following particulars:

Amendment V to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous, crime, * * * nor be deprived of life, liberty or property without due process of law; * * *."

Amendment VII to the United States Constitution:

"In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of common law."

VI

STATEMENT OF CASE AND BASIS FOR FEDERAL JURISDICTION OF COURT IN FIRST INSTANCE

Jurisdiction of this case in the United States District Court for the Northern District of Alabama was founded on diversity of citizenship and the amount in controversy. Respondent, Central of Georgia Railway Company, is a Georgia Corporation, with its principal place of business being Savannah, Georgia. Petitioner is incorporated under the laws of the State of Delaware, with its principal place of business being New York City, New York. The situs of the controversy is Trion, Georgia, and the amount in controversy exceeds $10,000.00, exclusive of interest and costs.

At the risk of some slight repetition and because various aspects of this case have been litigated in several Courts during the past ten years, attempt will be hereinafter made to state the same in more or less the chronological order of significant events as they occurred.

The cause of action in which the judgment of the Fifth Circuit sought here to be reviewed on Certiorari is ex contractu and arose out of an accident which occurred on *December 20, 1966* when J. P. Steed, a trainman-employee of Central of Georgia Railway Company, was injured while switching railroad cars at the plant of Riegel Textile Corporation in Trion, Georgia. A car, moving along a spur track owned and maintained by Riegel, on which Steed was riding, derailed, thereby causing his legs to be pinned between the side of said car and the loading platform which ran parallel to the track, resulting in serious and disabling injury to him.

On *March 1, 1967* Steed filed a Federal Employers Liability Act suit against Central of Georgia in the Circuit Court of Jefferson County, Alabama. On December 9, 1968, Central filed a third party complaint in the State Court against Riegel, seeking indemnification from it in the event of a recovery by Steed against Central.

The third party complaint is based upon a written side track agreement dated April 24, 1948 which was in effect between Riegel and Central at the time of the accident. The specific language in said agreement made the basis of Central's claim reads as follows:

> "9. The tenant (Riegel) also agrees to indemnify and hold harmless the Railroad (Central of Georgia) from loss, damage, or injury *from any act or omission of the tenant*, its employees or agents, to the person or property of the parties hereto and their employees and the person or property of any other person or corporation, while on or about said track; and if any claim or liability other than from fire shall arise from the *joint or concurring negligence* of the parties hereto, it shall be borne by them equally.

Two other clauses contained in this 1948 agreement which should also be considered as pertinent to the cause herein are as follows:

> "2. The tenant (Riegel) will pay for, own and maintain the entire track, from the point of the switch to the end of the track, or about 720 feet in length, as shown in green on said print.
>
> 4. If the tenant fails to maintain said track in safe operating condition, as prescribed by the railway, the Tenant agrees that the railway may put it in repair at the Tenant's expense or may discontinue operating thereover."

On *May 1, 1969* Riegel filed a petition for the removal of the entire case from the State Court to this Court, and on May

2, 1969, Honorable H. H. Grooms, Judge of the United States District Court for the Northern District of Alabama, on Motion to Remand, entered an order remanding the original complaint (*Steed v. Central of Georgia*) to the State Court but retaining jurisdiction over the third party complaint. This action of Judge Grooms was affirmed by the Court of Appeals for the Fifth Circuit. See in this regard *Central of Georgia Railway Company v. Riegel Textile Corporation*, 426 F.2d 935 (5th Cir. 1970).

Trial of the FELA case in State Court eventuated in June, 1969, resulting in a judgment in favor of Steed and against Central of Georgia in the sum of $500,000.00, which the State Trial Judge subsequently reduced by remittitur to $300,000.00 and otherwise overruled Central's Motion for a New Trial. The Remittitur was accepted by Mr. Steed and Central then appealed to the Supreme Court of Alabama which, on April 8, 1971, affirmed. Railroad's motion for Rehearing in that Court was overruled. See *Central of Georgia Railway Company v. J. P. Steed*, 287 Ala. 64, 248 So.2d 110. Appendix "D" in the Addenda hereto.

The case now before this Court was held in abeyance at the District Court level pending the final disposition of the primary case above mentioned in the State Court system. Upon the same being concluded with the Decision of the Supreme Court of Alabama hereinbefore referred to and the Railroad's loss on account of the injury sustained by Steed on Riegel's premises being finally established, the third party complaint incorporating Central's contractual action under its Spur Track Agreement with Riegel came on for trial and Summary Judgment was rendered by the District Court in favor of Central awarding full indemnity. Said Summary Judgment, however, was reversed by the Fifth Circuit in *Steed v. Central of Georgia Railway Company*, 477 F.2d 1303, and on account of its importance herein a copy of the Court's Opinion is incorporated in the Addenda hereto as Appendix "C".

A second trial of the case here before the Court came on and under the same set of facts, except for some enlargement by the additional testimony of Central's Acting Train Master, B. F. Griffin, contradictory of previous evidence adduced from him, the same pretrial order outlining the issues and in a case nowise different from the one in which the Fifth Circuit had already adjudicated there was a genuine issue of facts and set aside a Summmary Judgment predicated on the erroneous conclusions of the Trial Judge to the contrary. Virtually the same ruling already held to be erroneous in *Steed v. Central of Georgia Railway Company*, 477 F.2d 1303 was again rendered by the same District Judge but this time in the form of a Directed Verdict in favor of Central and against Riegel, yet based upon the exact factual situation which obtained in *Steed v. Central of Georgia*, supra.

Reference is now made to various pleadings, proceedings and judicial rulings connected with the third appeal of this case which resulted in the Decision of the Fifth Circuit on April 5, 1976 here sought to be reviewed so that the issues involved and the evidence relating thereto will be familiar to this Court.

(a) ***Pertinent pleadings, Charge of the Court and matters concluded by the Verdict of the Jury in Central v. Steed, 287 Ala. 64, as related to the issues in Steed v. Central of Georgia submitted herewith to show that judgment in favor of Steed and against Central in the State Court case was not premised on the Railroad's breach of a nondelegable duty to provide a safe place for its employees and its liability in this connection for the acts or omissions of the Industry but was based on the negligence of Central's own employees.***

The transcript in the appeal of this case to the Supreme Court of Alabama was offered by both sides in the consideration by the Court Below of the third party plaintiff's Motion for a Directed Verdict herein from which we supply the following:

(1) *In Count One of the Complaint, Steed alleged:*

"Plaintiff avers that all of his aforesaid injuries and damages proximately resulted, *in whole or in part, from the negligence of the officers, agents, or employees of the defendant (Central of Georgia Railway Company) while acting within the line and scope of their employment by the defendant* or by reason of a defect or insufficiency due to the negligence of the defendant in its cars, engines, appliances, machinery, track, roadbed, works or other equipment."

(Tr. p. 6E, *Steed v. Central of Ga.*) (Emphasis Supplied)

In Count Two of his Complaint, Steed alleged:

"And plaintiff avers that he was caused to sustain and suffer all of his aforesaid injuries as a proximate result, in whole or in part, *of the negligence of the defendant (Central of Georgia Railway Company) in that the defendant negligently failed to exercise reasonable care to furnish or maintain plaintiff a reasonably safe place to perform his aforesaid work for the defendant.*

(Tr. p. 6E, *Steed v. Central of Ga.*) (Emphasis Supplied)

The defendant pled in short by consent (Tr. p. 11, *Steed v. Central of Georgia*), thereby making it encumbent upon the plaintiff to prove to the reasonable satisfaction of the Jury the above quoted averments of his Complaint.

(2) *In the Trial Court's Charge to the Jruy, to which, incidentally, the Railroad through its counsel interposed no exceptions, Judge Windham made the following statements concerning the two Counts in the Complaint:*

"In the first one here, he alleges in blanket form *negligence on the part of employees of the railroad* while

working for the road, and carrying out their duties for the road or negligence on the part of the road itself as a corporate entity, or upon some superintendents or somebody above while carrying out his duty for the railroad."

(Tr. p. 444, *Steed v. Central of Ga.*)

* * * * * * *

"The man, in that second count, says he was working for the railroad company at the time he was hurt, and he says that he was hurt directly by reason of negligence in the matter of failing to furnish to him a reasonably safe place to do his work."

(Tr. p. 445, *Steed v. Central of Ga.*)

In characterizing negligence which might be attributable to the Railroad, the Trial Court advised the Jury:

"* * * if you find that the man was not handling himself as would a reasonably prudent person riding the front end of the car in going back in there * * *. If you were to find that he was not handling himself as would a reasonable prudent person, that would be what we call negligence.

On the other hand, if you find that the arrangement in there, whether in one aspect or in another, whether it was his way or that way, or the other, *if you found it was not set up and taken care of as the railroad should reasonably do, why then that would be, of course, negligence, if they were not handling their affairs there as would a reasonably prudent and reasonably careful railroad would under like circumstances. If they were not doing that, that would be negligence.*"

(Tr. p. 448, *Steed v. Central of Ga.*) (Emphasis supplied).

(3) *On Pages 455 and 456 of the Transcript in Steed v. Central of Georgia, reference is made to the forms of verdict submitted to the Jury as follows*:

> "You will find the two counts in the complaint in writing, and you will find these forms of verdict, which have already been made out and are ready for you to sign either way, either for the defendant or for the plaintiff.
>
> The form, if you found for the plaintiff, is a little longer than the other one. It says 'We, the jury, find for the plaintiff and against the defendant and assess the amount of damages at the sum of .....'
>
> * * * * * * *
>
> Now, you will find also here, together with this one, the shorter form, which is the form you use if you find for the defendant. It says, 'We the jury find for the defendant,' with a place for the signature of your foreman.

The transcript in *Steed v. Central of Georgia* further reflects that Motion for New Trial was duly made by the Railroad, the same being overruled. The case was then appealed to the Supreme Court of Alabama wherein it was affirmed. *It thus appears that the "general verdict" of the Jury which was affirmed responds to both Counts of the Complaint*, one of which related to the general negligence of Central of Georgia Railway Company *through its servants, agents, or employees in the operation of the Railroad* and the other the failure of the defendant to furnish the plaintiff with a reasonably safe place to work. This second count, according to counsel for Central, relates to a non-delegable duty and imposes a vicarious liability on the Railroad for the conduct of others. *The first count, however, relates only to the negligence of the Railroad, as is demonstrated by the Record hereinbefore referred to.*

(b) **Pertinent portions of the third party proceedings in Central v. Riegel:**

We now refer to the transcript of the pleadings and proceedings herein from which the following appear:

(1) In the third party complaint, Central, in referring to the accident in which Steed was injured, charges that the same "*occurred as a proximate result of the negligence of Riegel Textile Corporation in placing debris or permitting debris to remain on the track covered by said Track Agreement and as a proximate result of said negligence the rails of said track became clogged, proximately causing the railroad car on which the plaintiff was riding to derail and thereby proximately causing the injuries and damages which the plaintiff, J. P. Steed, has alleged in his complaint*" (Item 2, Tr. *Central v. Riegel*).

(2) In the Pretrial Hearing, it *was stipulated that the matter of Riegel's liability, if any, was to be determined in accordance with the indemnity provisions of the Side Track Agreement, as hereinbefore referred to, and under the law of the State of Georgia, where the accident occurred, and it was stipulated in effect that the same was drafted by Central's successors in reorganization.* The Pretrial Order shows that, among other things, the following contentions were made by the parties:

> "Central takes the position that since it gave Riegel notice of the filing of Steed's law suit and gave it an opportunity to defend, which Riegel refused, the final judgment in Steed's case is conclusive against Riegel since it established that he was not furnished a safe place to work. On the other hand, it is Riegel's contention that the judgment against Central in the Alabama State Court is a prima facie showing that Central was negligent and that there was at least joint and concurring negligence by Central and Riegel."
>
> (Item 8 Tr. *Central v. Riegel*)

The case here under consideration, wherein Central's Summary Judgment against Riegel had been reversed, again came on for trial commencing March 4, 1974. Central opened with its counsel introducing as Exhibit 1 the Transcript of the Evidence adduced in the State Court trial of *Steed v. Central of Georgia*, 287 Ala. 64, 248 So.2d 110, with all exhibits thereto and proceeded to read certain selected portions therefrom, i.e., excerpts from the testimony of Steed, himself; Willie Speer Wilbanks, a Riegel employee, and William Acton Russell, the Railroad's Engineer who was operating its train when Steed was injured. This was thereafter followed with the reading of the depositions of Rufus Eberhart, Central's Flagman; Andrew Thomas McLendon, its Conductor on the occasion complained of, and Russell, its aforementioned Engineer. These depositions were introduced in their entirety, along with that of James Long, Safety Director for Riegel at its Trion Plant. The only evidence presented ore tenus was that of Billy G. Grffin, Central's Acting Train Master on the occasion of Steed's accident and whose testimony, as previously given but with conflicting tendencies, was also included in the transcript offered from the State Court trial of *Steed v. Central*, supra.

Griffin was vigorously cross-examined by counsel for Petitioner who thereafter rested without offering other testimony, being content to rely upon the favorable tendencies in the evidence contained in the State Court Transcript of Steed's trial and the depositions hereinabove mentioned, this being the same proof which the Fifth Circuit had in *Steed v. Central of Georgia Railway Company*, 477 F.2d 1303 adjudicated as creating and rising to the dignity of genuine issues of fact so as to prevent Central from being entitled to Summary Judgment.

On March 7th, at the close of all the evidence, both sides filed Motions for a Directed Verdict as to each of the basic issues involved, namely, whether or not the Industry was guilty of acts or omissions equating to negligence which proximately

caused Steed's injury on the occasion complained of and whether or not the Railroad was guilty of joint and concurring negligence contributing to cause the same. The District Judge thereupon announced he had concluded to grant Central's Motion for a Directed Verdict, it being his position that the Oral Charge which he proposed to give would be tantamount to the same anyhow; whereupon, the Railroad's attorney was instructed to prepare a Proposed Order directing a verdict in favor of Central and to furnish a copy of same to the Court and opposing counsel.

On July 16, 1974, over three months after conclusion of the trial, a Memorandum Decision drafted by the Railroad's lawyer and submitted to the District Court, with copy to Petitioner's attorney, was filed, the same being incorporated into the judgment thereupon appealed to the Fifth Circuit and becoming a part of the Record herein. The summary of evidence, self-serving in nature and prepared by Central's counsel to buttress the so-called Findings of Fact entered by the District Judge, as if this were a non-jury case, which it was not, is footnoted in the Opinion of the Fifth Circuit dated April 5, 1976. See Appendix "A" in the Addenda hereto. A copy of the Memorandum Decision of the District Court is included in the Addenda here to as Appendix "B" as aforementioned and in attempted compliance with Supreme Court Rule 23.1(i).

Without being certain of its right to do so but, hopefully and for the enlightenment of this Court, Petitioner submits as Appendix "E" of the Addenda hereto, beginning at Page E-1 with citation of its source, some selected but short testimony excerpted from the Transcript of Evidence and for the purpose of showing its sufficiency to create jury issues. This is done as a basis for the Court's comparison of the same with the Summary of self-serving evidence from the District Judge's Memorandum Decision (footnoted in Appendix "A" of the Addenda hereto) and in support of his unauthorized fact-finding herein-

before referred to which the Fifth Circuit has adopted as supporting its Opinion here sought to be reviewed.

Hereinafter follows a description of the facts leading up to and surrounding Steed's accident, much of which is drawn from the selective evidence which is the subject of Appendix "E" above mentioned. From a Record standpoint, said Statement suggests facts and inferences thereof which are to be found, generally, in Plaintiff's Exhibits 2 through 8 in *Steed v. Central*, supra, and referred to in the Deferred Appendix herein at pages 66-67, 92-93, 233-234 and 237. See also Central's Exhibits 8 and 9 to the deposition of James Long in the case sub judice, Deferred Appendix, pages 238 and 239, and see the testimony of Joseph Price Steed, Central's injured Flagman, Deferred Appendix, pages 62, 66, 67; Central's Train Master, C. P. Shell, Jr., Deferred Appendix, pages 91-96; B. F. Griffin, Central's Acting Train Master, Deferred Appendix pages 188-201, 203-205; Central's Brakeman, Rufus Eberhart, Deferred Appendix, pages 98-104; William Acton Russell, Central's Engineer, Deferred Appendix, pages 87, 88, 123-128, and Central's Conductor, Andrew Thomas McLendon, Deferred Appendix, pages 114-120.

(c) **Statement of Facts, as aforementioned**

As heretofore indicated, Central's claim against Riegel stems from the accident in which its employee, Steed, was injured while working as a flagman for the Railroad and during the course of a switching operation on December 30, 1966 at the Industry's plant in Trion, Georgia. At the time, Steed was riding on the lower ladder at the left front corner of a gondola railroad car which, along with three other cars of various types, was being shoved in a southerly direction on the CFP track which is referred to in the Indemnity Agreement between Central and Riegel. The purpoes of the switching operation was to couple

the gondola on which he was riding with a box car which had been standing on said siding for some period of time awaiting being pulled therefrom by the Railroad.

There are actually two tracks leading into Riegel's premises from Central of Georgia's main line, one being known as the CFP track, heretofore referred to, and the other being designated as the coal track. These split at a point approximately 180 feet generally north of separate gates through which they pass to enter Riegel's plant which is bounded on the north by a chain wire fence. At the point where the CFP and coal tracks come through their respective gates, they are separated in distance by about 30 feet, with the coal track lying to the west and the CFP track on which Steed was injured paralleling it to the east. *There are no structures on the area between these two sets of tracks for a distance of approximately 150 feet from the gates through which they pass to the north end of the boiler room facilities at the plant*, at which point they are less than 50 feet apart. The place where the car on which Steed was riding derailed is approximately 30 to 40 feet south of the northeast corner of the boiler room and between it and the loading platform to the warehouse or bleaching building east of the said CFP track. Plaintiff's Exhibit 8 in *Steed v. Central* accurately depicts the various objects hereinbefore described. The physical features hereinbefore referred to and mentioned at other points herein are also set out in numerous photographs which were introduced into evidence and several drawings.

The switching crew had been moving cars on the coal spur for some 30 minutes before pushing south on the CFP track. These activities, therefore, were carried on in close proximity to where Steed was subsequently injured because, as previously mentioned, the distance between said tracks immediately to the north and in which area there were no structures, ranged from 30 to 45 feet. *These physical facts, of course, have some bearing on the issue of whether or not members of the train crew had*

ample opportunity to observe the conditions, whatever they were, which prevailed at the place of derailment.

As Steed rode south on the left front of the "lead" car, he maintained contact by walkie-talkie radio with the Engineman, W. A. Russell, who was operating the locomotive from the other side of the train where he could not see Steed on account of the several cars which separated their respective positions. *The Conductor, Andrew Thomas McLendon, had stationed himself on the ground on the west side of the C.F.P. track near the gate and between it and the spur to the coal yard, at which point he was less than 200 feet north of where the lead car of the train subsequently derailed as it was being shoved slowly to the south.* He gave no explanation as to why, before the train was moved he did not look ahead down the C.P. tracks and notice the dirt and debris claimed to have been there less than 70 yards away.

It is not clear from the record just where the Brakeman, Rufus Eberhart, was located but in his deposition he indicated that he saw the car on which Steed was riding when it hit the platform and had just come down off one of the cars himself. There is a fair inference that he was in a vantage point to view the track ahead as the train traveled south.

According to crew members, as the train pushed forward to make its coupling, its speed was 2 to 3 mph and under conditions whereby, according to the Engineer, he could and did stop within 4 or 5 feet upon application of brakes. Another witness, however, estimated the speed at 10 mph. During this approach, and as the distance narrowed between the front end of the gondola on which Steed was riding and the box car to the south which was to be coupled, the Flagman counted off to the Engineer, over his walkie-talkie, the intervening car lengths traveled as the *"lead"* car came closer to the stationary one which was to be pulled out. After hearing Steed count down, *"six car lengths, five car lengths, four car lengths, three car lengths,"* according to Engineman Russell, he *"lost communication"* but continued

to creep forward until, in his judgment, an interval of two more car lengths had elapsed at which time he decided that something must be wrong and braked the train to a halt.

Inasmuch as the average length of a railroad car is 40 feet, it was Russell's opinion that he traveled forward a distance of approximately 80 feet while *"out of communication"* and before he determined to obey the operating rule of Central of Georgia which provides *"when moving a train, engine or cars by radio communication and contact is lost with the employee directing the movement, the movement must be stopped until communication is restored or other signals are used to complete the movement."*

After the train was stopped, there was still a distance of approximately one car length separating the front end of the *"lead"* car on which Steed had been riding and which had derailed, from the north end of the box car parked to the south. Steed was in a sitting position on the loading platform of the warehouse to the east of the tracks, holding his leg in agony. He had become pinned between the left front corner of the *"lead"* car and the loading dock a few feet to the north of where he was sitting and had rolled forward. The hopper car on which he had been riding was derailed with the front wheels off the track to the left and its left front corner situated between the rails and the warehouse platform to the east.

The testimony of the railroad crew in the trial of *Steed v. Central* and also in their depositions herein was to the effect that the track conditions on the Riegel premises were very much as they had always found them to be and that they observed no defects in the same which would constitute a hazard. *Their conclusions in this regard at least made a jury issue as to whether Riegel was guilty of any negligence.* There was evidence that there was an accumulation of debris consisting of rocks along the track and at the point of derailment and, further, that there

was mud and water. There was testimony, however, that these rocks were part of the "*ballast*" used by the railroad between the rails of its tracks and there was also testimony from which it could have been inferred that the debris was in the nature of construction material such as sand and gravel, piles of which were stored in close proximity to the place of the accident and which was being used by a contractor, namely, McBurney Stoker Company, which had been working in the area. It could also be inferred from the evidence that some of the rocks on the track had come from trucks hauling material to said contractor. There was no evidence of negligence on the part of Reigel in this respect, however. Although it was not raining at the time of the accident, there had been hard rains at the scene during the two days immediately preceding the same which had stopped early that morning, leaving puddles of water at various points along the tracks.

There was absolutely no evidence in either the trial of *Steed v. Central* or to be drawn from the depositions of the witnesses taken in this proceeding that any of the debris on the tracks where the derailment occurred had come from vehicles owned or operated by Riegel, its servants, agents, or employees, and on account of its negligence. It could have consisted of coal or cargo dropped from Central's own cars, if we are to engage in conjecture. The entire record here is devoid of any testimony as to how long the condition which Central claims rendered the tracks unsafe had existed prior to Steed's accident and as to knowledge on the part of the Industry of the danger, if any, which it posed. *There was mention of derailments in years past but none attributed to any foreign material on the CFP track or any condition caused by Riegel.* These previous derailments were never explained by the Railroad. There was no evidence concerning complaints by Central to the Industry regarding any unsafe conditions at any time or demands that the track bed be repaired by Riegel or that it pay for corrections made by Central.

There was testimony that, as directed by the conductor in

charge of his crew, Steed had placed himself in the most dangerous position open to him in riding the lead car into the plant by standing on the lower ladder at the left front where the clearance between it and the loading dock to his left narrowed to a bare minimum when he could have elected to perch himself at some point higher on the hopper, out of danger, or have walked along the platform or even on the track bed, in a place of safety in advance of the gondola as it moved slowly southward. There was no evidence that the Railroad had ever warned him of the danger to which he was subjecting himself in this respect or recommended any of the safer alternatives. *The testimony of all the members of the train crew as to what they saw both immediately before and right after the accident was substantially that the conditions which obtained were the same as on all other occasions when they had traveled along the track without any problem.* The Conductor, McLendon, advised that upon inspecting the tracks, as was his duty, during the period immediately following the derailment, he was unable to discover any condition to account for the same; hence, reported the cause as "unknown."

It was undisputed that whether any of the members of the train crew paid particular attention to the CFP track just before the derailment occurred, its condition, whatever it may have been, was open to their observation and in their switching operation they were in a position to see for themselves if any unsafe condition existed before the train was shoved along the siding where Steed was ultimately injured. It also was not controverted that under the Operating and Safety Rules of the Railroad it was the responsibility of the conductor to "*look out*" for the welfare of his crew and that this included making an inspection of the trackage ahead of any switching movement to see that the same was not in any dangerous or defective condition.

VII

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

Simply stated, there are really only two issues to be here resolved, i.e., whether or not the Fifth Circuit was correct in its application of FELA standards in offering its Opinion of April 5, 1976 sought to be reviewed herein and if, in reaching its Decision which is the subject of this Petition, said Court of Appeals itself departed from the accepted and usual course of judicial proceedings universally recognized as being required for appellate disposition or sanctioned the Trial Judge's failure to follow the Federal Rules of Civil Procedure and precedents relating thereto in such measure as to invoke the supervisory power of the Supreme Court. Determination of these inquiries presents considerable difficulty, however, for that the several Federal cases which purport to speak to the problems involved are somewhat in conflict and not easy to reconcile. In any event, we advert now to a discussion of these important questions:

A

Were FELA Standards Due to Be Applied Herein and, If So, Against Whom and in What Sense?

There are a minimum of 300 Railroads in the United States and each of them serves many sidings which are the subject of Spur Track Agreements with Industries similar to and in numerous instances identical with the one here under consideration. When we think in terms of the number of Industries thus served, it is easy to believe that literally thousands of this type contract are in existence which relate to situations where there is a potential exposure for an injury to a railroad worker under the FELA and a resultant liability and loss to his employer for

which the Railroad will attempt to seek indemnity from the Industry involved.

The Law Reports as published by West are filled with Decisions wherein such Sidetrack Agreements have been litigated, both in Federal and State Courts, and it is not unrealistic to estimate that cases of this character already reported run into the hundreds. For typical examples wherein the Railroad's loss stemmed from injury to an employee whose rights were governed by the Federal Employers Liability Act, Title 28 USCA, § 51, and for which it sought indemnity from the industry under a Spur Track Agreement such as one very similar to that which is discussed here, we refer the Court to the following:

Rouse v. Chicago, Rock Island & Pacific RR Co., 474 F.2d 1180, 8th Cir. 1973, *Iowa law applied;*

Missouri-Pacific RR Co. v. Arkansas Flooring Co., 434 F.2d 575, 8th Cir. 1970, *Arkansas law applied;*

Freed v. Great Atlantic & Pacific Tea Co., 401 F.2d 266, 6th Cir. 1968, *Ohio law applied;*

Penn. RR Co. v. Erie Ave. Warehouse Co., 302 F.2d 843, 3rd Cir. 1962, *Pennsylvania law applied;*

Colonial Stores, Inv. v. Central of Georgia RR Co., 279 F.2d 777, 5th Cir. 1960, *Georgia law applied;*

Security Ins. Co. of New Haven v. Johnson, 276 F.2d 182, 10th Cir. 1960, *Kansas law applied;*

Atlantic Coast Line v. Robertson, 214 F.2d 746, 4th Cir. 1954, *South Carolina law applied;*

Booth-Kelly Lbr. Co. v. Southern Pacific RW Co., 183 F.2d 902, 9th Cir. 1950, *Oregon law applied.*

A reading of such Opinions as heretofore rendered by various Appellate bodies shows much disarray in respect to the various theories of liability and rulings relating thereto in Sidetrack

controversies between Railroads and Industry. *It may be well said that results of litigating such agreements are not uniform but, on the contrary are very much in conflict.* In this posture, therefore, the impact of the Federal Employees Liability Act and the inference which should be accorded it in the determination of such disputes becomes most vital, being much the same as in the instance of a similar Indemnity Agreement involving Contractors, Subcontractors and Owners in the Construction Industry and in which connection the Supreme Court has advised its reason for granting certiorari in *U. S. v. Seckinger*, 397 U.S. 204, 90 S.Ct. 880, to be as follows:

> "[1] This case concerns the construction of a provision common to fixed-price government construction contracts that states that the private contractor 'shall be responsible for all damages to persons or property that occur as a result of his fault or negligence * * *.' The Court of Appeals for the Fifth Circuit held that the provision could not be construed to allow the Government to recover from the contractor damages suffered by the Government on account of its own negligence. 408 F.2d 146 (1969). *We granted certiorari because of the large amount of litigation that this contract clause has produced*[1] *and because of the divergent results that the lower courts have reached in construing the same or similar provisions.*[2] 396 U.S. 815, 90 S.Ct. 104, 24 L.Ed.2d 67 (1969). We reverse." (Emphasis supplied.)

It is submitted there is another compelling reason why this Court should entertain Certiorari in the instant case in respect to the application of the Federal Employers Liability Act to the issues herein, this being the fact that *a very important Federal Statute is involved concerning which there has been a variety of opinion and it has been the rule rather than the exception for the Supreme Court to lend its aid in resolving conflicts thereunder*, particularly in situations such as here where

the sufficiency of the evidence to submit a case to the jury is concerned. In this connection, see *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 77 S.Ct. 457, wherein it is postulated:

> *"Special and important reasons for grant of certiorari in cases under Federal Employers' Liability Act are present when lower federal and state courts persistently deprive litigants of* their *right to a jury determination."* (Emphasis supplied.)

Other cases of similar import are: *Davis v. Virginia RW Co.*, 361 U.S. 354, 80 S.Ct. 387; *Southern Pac. v. Gileo*, 351 U.S. 493, 76 S.Ct. 952; *Reid v. Penn. RR Co.*, 351 U.S. 502, 76 S.Ct. 958. See also *Seago v. New York Central R. Co.*, 315 U.S. 781, 62 S.Ct. 806, where certiorari was granted *"On the ground that there was sufficient evidence of negligence for submission to the jury."*

It is pointed out in *Davis v. Virginia RW Co.*, supra, that on account of the importance of uniform administration of the FELA, Certiorari was granted. As far back as 1949 in *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S.Ct. 413, this Court, according to the concurring Opinion of Mr. Justice Douglas, had since the 1943 Term granted 20 Petitions for Certiorari out of 55 filed, which did not include cases that, although arising under the Act, presented issues other than those of negligence. By 1959, some ten years later, Certiorari had been issued by the Court in 33 more FELA cases, in which connection see the extension as set out in the Appendix to the Opinion of Mr. Justice Douglas in *Harris v. Penn. RR Co.*, 361 U.S. 20, 80 S.Ct. 22. It is not unreasonable to suggest that the Court has issued several more writs of Certiorari in cases under the Act in the 17-year period which has now elapsed since the aforementioned compilations.

The Supreme Court has yet to consider in what regards, if any, FELA standards relating to what constitutes negligence there-

under and the quantum and quality of proof necessary to sustain a jury issue are to be applied in the countless cases of Railroads against Industries under Sidetrack Agreements wherein indemnity is claimed for loss sustained on account of the Railroad's liability to its employee under the Act.

As we will hereinafter demonstrate, the Decisions of the Supreme Court and the various Courts of Appeal are not clear as to whether or not FELA negligence is one and the same as common law negligence. This Court has spoken several times concerning the minimal proof of negligence and proximate cause necessary to create a jury issue but never in respect to the claim of a Railroad against an Industry for indemnity stemming from its liability under the Act to one of its employees, such as we have here.

The Fifth Circuit, in *Boeing v. Shipman*, 411 F.2d 365 (1969) is the only Court of Appeals which has addressed itself to the inquiry as to whether or not the Federal Employers Liability Act requirements relating to the sufficiency of the evidence to submit a case to a jury are controlling in a diversity action, holding they have no application in a suit brought by Boeing's employee against it under the common law and the Alabama Employers Liability Act. *In the case here sought to be reviewed, the same Court has held in a contract action under an Indemnity Agreement that FELA principles are to be applied, this being directly in conflict with its holding only a few years before in Boeing v. Shipman, supra.* Should there be a distinction? Petitioner says not.

The Fifth Circuit has reversed itself on this inquiry, vacillated from one pole to another, and in its last Decision, i.e., the one here under consideration and wherein Certiorari is sought, returns to the premise that *FELA principles are to be applied in a diversity case which is not a suit by an injured railroad worker against his employer and grounded on the statutory remedy provided by Title 28, USCA, Sec. 51* but by contrast is a contract

action on the part of Central against Riegel for indemnity. The Court of Appeals commences its inconsistency with *Planters Mfg. Co. v. Protection Mut. Ins. Co.*, 380 F.2d 869 (5th Cir. 1967) holding that Federal Courts must apply the same standards employed in FELA cases to diversity cases in determining the sufficiency of evidence to raise a question of fact for the Jury. In *Boeing*, 411 F.2d pp. 370-373, the Fifth Circuit, turning itself around, discusses the problem in depth under the heading "Federal Employers Liability Act Standard for Sufficiency of Evidence is Applicable" and reasons rightly:

* * * * * * *

> *"we now reject the Planters principle and hold that the FELA test is peculiar to that kind of case as a consequence of the statute itself and is accordingly not applicable in non-FELA jury trials.*
>
> * * * * * * *
>
> *Although the Supreme Court has not answered the question of law, no Circuit Court of the United States, other than the Fifth Circuit, has held that the FELA test of sufficiency of evidence is applicable in non-FELA cases.*

* * * * * * *

Finally, the Seventh Amendment of the United States Constitution providing for trial by jury does not require, either expressly or impliedly, that the test of sufficiency of evidence to create a jury question in a non-FELA federal case be the same as in an FELA case.

* * * * * * *

The standard provided by the Supreme Court and Circuit Courts in FELA cases for sufficiency of evidence to create a jury question is proper under the Federal Employers' Liability Act, and with this we do not disagree. *But in non-FELA federal cases which are not based on statute, the formulation of the test of sufficiency of evidence is substantially different."* (Emphasis supplied.)

Here in its lastest discourse on the subject, the Court of Appeals ignores its own rationale and holding in *Boeing v. Shipman*, supra, and in another *non-FELA* diversity case says that the alleged acts or omissions of Riegel which it would equate to negligence are to be adjudicated via the standards of the Federal Employers' Liability Act! *We submit, therefore, this is a situation involving important considerations which should be clarified by the Supreme Court of the United States so that the matter may be put to rest.*

Professors Wright and Miller discuss this problem in their work *"Federal Practice and Procedure"*, Vol. 9, § 2526, pages 554-559, by reviewing the standards of proof required to make out a jury case as advanced in *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740; *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 64 S.Ct. 409; *Rogers v. Missouri-Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443 and *Wilkerson v. McCarthy*, supra, which relate mainly to Federal Employers' Liability Act and Jones Act litigation and observing:

> "Plainly, these cases evidence a very restrictive view of the circumstances under which a Directed Verdict, or Judgment Notwithstanding the Verdict, may be ordered in actions under these two statutes. * * *. *It is extremely important to know whether the decisions are confined to the particular statutory actions in which they have been handed down or whether they represent a construction of the Seventh Amendment and, thus, are controlling in all jury cases in Federal Courts.* To this question there are powerful arguments both ways and no very clear answer.
>
> * * * * * * * *
>
> *A decision by the Supreme Court, clearing stating which view it takes as to the scope of the FELA and Jones Act decisions, would be of helpful guidance to the lower federal courts.*
>
> (Emphasis supplied)

The Opinion of the Fifth Circuit in the case sub judice is far from clear in respect to the manner in which the Federal Court has itself applied or approved the application of the District Judge of FELA law in the premises. *By advising that the alleged acts or omissions of Riegel are to be determined under the law which would make Central liable to Steed, does the Circuit Court have in mind what constitutes negligence under the circumstances of this suit or is it referring to the sufficiency of the evidence necessary to sustain submission to the jury?* Perhaps it means that FELA principles should cover both of these factors but its Opinion does not so state and we are left to speculation.

(1) The Effect of Applying FELA Principles of Proof to This Case

If the Court below is speaking in its Decision of proof of negligence sufficient to create a jury issue as being governed by FELA standards, *it fails to apply such a measuring device with an even hand because, while suggesting that Riegel's negligent "acts or omissions" are to be determined on the basis of the Railroad's liability to Steed under the Federal Employers Liability Act, it does not, by the same token, gauge the conduct of Central, which Petitioner contends constitutes joint and concurring negligence, by FELA principles.*

It is a poor rule which does not work both ways and one which here, as applied by the Fifth Circuit, discriminates against Riegel and deprives it of property without due process of law, as well as infringing on its right to a trial by jury. The second Circuit, in a spurtrack decision written by Chief Judge Clark with the concurrence of Associate Judges Swann and L. Hand, addresses such a situation in *Wanser v. Long Island RR Co.*, 238 F.2d 467 (1956) as follows:

> *The Railroad objects to the action of the judge in submitting the issue of a possible concurrent negligence to the*

jury. But it was not error to instruct the jury that there was concurrent negligence if the Railroad's negligence in laying the track concurred with Islip's later acts of negligence in producing the injury. The *Railroad argues that its manner of laying the track, even if it constituted "negligence" under the F.E.L.A., could not constitute "negligence" within the meaning of the contract.* But the parties to the contract are held to have known of the existence of the federal statute at the time they executed their agreement, and *we would surely have to torture its clear words to find they intended in cases such as this that the Railroad's "negligence" to its employee was to be determined under the federal statute for one judgment and under the common law for the other.*

(Emphasis Supplied)

The facts in *Wanser* were much the same as here and the Siding Agreement there involved identical. The Opinion is somewhat ambiguous as to whether the Railroad and Industry were each found guilty of FELA negligence, if there is such a thing, as opposed to common law negligence. *The point of the case however, is that the conduct of both is held due to be adjudicated by applying the same law evenly to each of the litigants, something the Fifth Circuit has not done here.*

It is to be noted the Opinion of the Fifth Circuit in nowise suggests that, in measuring the sufficiency of the evidence of the Railroad's *"joint and concurring negligence"* so as to invoke the *"equal shares"* clause in the indemnity Agreement which would limit Central's recovery to fifty percent of its loss, liberal standards of the Federal Employers Liability Act should govern. *This is very prejudicial to Riegel since for aught that appears, it has been required to establish its counterclaim against the Railroad in this connection by a quantum and quality of proof much more burdensome than that imposed on an injured workman in an FELA case;* whereas, the Fifth Circuit specifically

holds that in proving the alleged acts or omissions of Riegel which the Railroad contends equate to negligence, Central is only required to do so by the minimal standards of the Federal Employers Liability Act. *This is not "exact and equal justice to every man of whatever state or persuasion" as proclaimed by Thomas Jefferson to be due all litigants.*

The disparity in proof required to sustain a jury issue under the Common Law as contrasted to the sufficiency of evidence for the jury's consideration in an FELA case is illustrated in many Decisions of this Court and various Circuits. For instance, in *Nivens v. St. Louis & Southwestern Ry. Co.*, 425 F.2d 114 (5th Cir. 1970), it is postulated that the standards of liability for negligence under the Act are *significantly broader* than in ordinary common law negligence actions, with the Court further stating: *"Since the Act explicitly makes an employer liable if an injury results only in part from his negligence, the common law proximate cause standard is modified and the employee has a less demanding burden of proving causal relationship".*

The Supreme Court, in the leading case of *Rogers v. Missouri-Pacific RW Co.*, 352 US 500, 77 S.Ct. 443, discusses the evidentiary requirements in an FELA action, advising:

> "The test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury * * *. It does not matter that, from the evidence, the jury may also with reason, on the grounds of probability, attribute the result to other causes * * *. *The employer is stripped of his common law defenses* and for practical purposes the inquiry in these cases today rarely presents more than the simple question whether negligence of the employer played any part, *however small*, in the injury or death which is the subject of the suit." (Emphasis supplied)

The Seventh Circuit, in *Heater v. Chesapeake & Ohio RW Co.*, 497 F.2d 1243 (1974) expresses the situation thusly:

> *"The quantum of evidence necessary to establish liability is much less in a FELA case than it would be in an ordinary negligence case."*
>
> (Emphasis Supplied)

The Fifth Circuit, in *Boeing v. Shipman*, supra, holding the Federal Employers Liability Act standard for sufficiency of evidence is inapplicable in cases other than those specifically brought under the Statute, points out:

> Slight negligence, necessary to support an FELA action, is defined as "a failure to exercise *great* care," and that burden of proof, obviously, is much less than the burden required to sustain recovery in ordinary negligence actions.
>
> * * * * * * *
>
> Beyond the fact that *a statutory action under the FELA significantly differs from a common law negligence action in terms of the standard of proof*, it is clear that the congressional intent in enacting the FELA was to secure jury determinations in a larger proportion of cases than would be true of ordinary common law actions. In other words, *"trial by jury is part of the remedy" in FELA cases.*

We contend the Court below was in complete error when it held your Petitioner, Riegel Textile Corporation, to be subject to the requirements of the Federal Employers Liability Act in connection with its *"Acts or omissions"* alleged by Central to constitute negligence on its part and, further, that its error was compounded by its failure to apply the standards of the Act in determining the *"joint and concurring negligence"* of the Railroad, if FELA requirements are controlling, which we contest. We submit, however, that even under FELA standards, the evidence of Riegel's "acts or omissions" was not so overwhelming

as to constitute negligence, *as a matter of law*, thereby entitling Central to a directed verdict in its favor. It seems to us that no matter what criteria is applied, FELA or Common Law, the proof in this case required submission to the jury as regards both the *"joint and concurring negligence"* of the Railroad and the *"acts or omissions"* of the Industry claimed to have constituted negligence.

(2) The effect of applying FELA rather than Common Law negligence to this case

As heretofore suggested, the Fifth Circuit, in its Opinion here under consideration, may, in its insistence that FELA law be applied, have been attempting to say there is a distinction between negligence, as such, under the Federal Employers Liability Act and as opposed to Common Law when it wrote:

> "* * * In referring to the agreement, which provides that Central be indemnified for 'loss, damage or injury from any act or omission of the Tenant', *Riegel would have us equate 'any act or omission' with common-law negligence.*
>
> * * * It was further concluded that Riegel's liability to Central, under the indemnity agreement, must be determined by the law making Central liable to Steed. * * *"
>
> (Emphasis Supplied)

We submit it is very doubtful there is any difference whatsoever between negligence, as referred to in the Federal Employers Liability Act, and common law negligence. Our position in this respect is that like *"A rose is a rose is a rose,"* it also follows that *"Negligence is negligence is negligence"* and although the definitions of *"negligence"* may vary adjectively, the words and phrases employed by Appellate Courts, Legal Text Writers, and Law School Professors, mean the same thing. *Black's Law Dictionary*, at page 1184, defines Negligence as *"The omission to do*

something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do." It characterizes *"Actionable negligence"* as being *"The breach or non performance of a legal duty, through negligence or carelessness, resulting in damage or injury to another."* These concepts of negligence in an actionable sense are universal and for this reason we contend that FELA and Common Law Negligence must, perforce, be one and the same.

As one might expect, however, the scriveners of Appellate Decisions have confounded the situation by loose writing which in some instances seems to suggest a difference between negligence at Common Law and under the Federal Employers Liability Act, *a distinction which we suggest is both subtle and artificial.* For instance, the Fifth Circuit, in *Atlantic Coast Line R. Co. v. Dixon*, 189 F.2d 525 (1951) maintains "* * * *Except as otherwise provided in the Act, liability is determined by Common Law principles* which define negligence as lack of due care in the circumstances, that is, the doing of acts which a reasonably prudent person would not have done, or the failure to do what a reasonably prudent person would have done in the circumstances, or both. Ellis v. Union Pac. R. Co., 329 U. S. 649, 67 S.Ct. 598, 91 L.Ed. 572; Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610; Missouri-Pac. R. Co. v. Aeby, 275 U.S. 426, 48 S.Ct. 177, 72 L.Ed. 351; McGivern v. Northern Pac. Co., 8 Cir., 132 F.2d 213, 217."

The foregoing is consistent with the statement of this Court in *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018: *"What constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable to State and local laws for other purposes."* In *Jamison v. Encarnacion*, 281 U.S. 635, 50 S.Ct. 440, this Court advises *"The Act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used.* Miller v. Robertson, 266 U.S. 243, 248, 250."

In *Siegrist v. Delaware, Lackawanna & Western RR Co.*, 263 F.2d 616 (1959), the Second Circuit points out that by enacting the FELA, Congress did not provide that a railroad should be liable in damages for any injury suffered by an employee but only for those injuries resulting in whole or in part from its negligence and makes the observation *"Congress did not define 'negligence' for purposes of the Act"*.

The Eighth Circuit, in *Chicago & N.W. Ry. Co. v. Rieger*, 326 F.2d 329 (1964) puts it this way:

> "* * *. Negligence in this type of case is determined by federal law. Siegrist v. Delaware, Lackawanna & Western R. Co., 2 Cir., 263 F.2d 616. *It is not necessarily the same as common law negligence.* Slaughter v. Atlantic Coast Line Railroad Company, 112 U.S.App.D.C. 327, 302 F.2d 912; Owens v. Chicago, Rock Island & Pacific Railroad Co., 10 Cir., 292 F.2d 696." (Emphasis supplied)

In the Slaughter case cited in the above quotation Headnote 2 of the published Opinion is to the effect that *"Negligence under Federal Employers Liability Act does not mean negligence in common law sense of term and is of broader significance"*. It is to be seen from the foregoing there is some difficulty in determining amongst the various Circuits precisely where each of them stands as regards inquiry of whether or not negligence under the FELA and negligence under Common Law are one and the same or a different breed of animal. *The conflicting views of several of the Courts of Appeal, expressed as they are*

in generalizations, should be resolved by the Supreme Court and the case at hand is one in which Certiorari can provide the opportunity.

It is Petitioner's position, basically, that what constitutes negligence must be determined on the basis of *Common Law Principles* except as the same may be abrogated by specific Statute in a given case. It is granted that the Federal Employers Liability Act may in some particulars modify the principles of common law negligence such as by the abolishment of the Assumption of Risk Doctrine and elimination of contributory negligence as a bar to recovery by an injured workman. These qualifications are not here relevant and we insist that in this case the negligence, if any, of both the Railroad and Industry was due to be determined by the law of the place of the making of their contract and its performance. See *Gusee v. Kaley*, 449 F.2d 1276 (1971) and *Security Ins. Co. of New Haven v. Johnson*, 276 F.2d 182 (1960), both Tenth Circuit cases.

B

Was Not Petitioner, Under Erie, Entitled to Have Favorable Georgia Law Applied in This Case?

At the Pretrial hearing in this case, the parties stipulated, and the District Judge so ordered:

> *"The matter of Riegel's liability will be determined in accordance with the above quoted paragraph from the Sidetrack Agreement, in accordance with the law of the State of Georgia where the accident occurred."* (Deferred Appendix p. 32)

The Fifth Circuit in this case refused to recognize the mandate of the Pretrial Order as above quoted and apply several statutory and common law rules which obtain in Georgia, the

situs of Steed's accident and the place of execution plus performance of the Sidetrack Agreement between the parties sued on, although the applicable jurisprudence of said State was singled out and argued to the Court below in the numerous Briefs which were filed on appeal. While embracing the rationale of the Tenth Circuit in *Chicago R.I. & P.R. Co. v. Dobry Flour Mills, Inc.*, 211 F.2d 785 (1954), which construed the *"acts or omissions"* referred to there in a Spur Track Agreement such as we have here to mean the wrongful or negligent acts of the Industry which would create FELA liability on the part of the Railroad and not on the basis of the Industry's common law liability, the Fifth Circuit nevertheless follows the philosophy of *Booth-Kelly Lbr. Co. v. So. Pac. Co.*, supra, which involves the rights and liability of the parties there on the basis of *Oregon law*. In so doing, the Court ignores Georgia law to the contrary as set out in one of its own cases, *Colonial Stores, Inc. v. Central of Georgia Ry. Co.*, 279 F.2d 777, 5th Cir. 1966, which also involves the identical Sidetrack Agreement here discussed and a similar set of facts to those in the instant case.

The application of the law of the State where the accident sued upon occurred and where the Indemnity Contract was executed and to be performed has been the rule rather than the exception in cases such as we have here, *Dobry* notwithstanding. In this connection, we again refer the Court to the compendium of eight Decisions from that many different Circuits which are cited at the forepart of this Petition following the third paragraph under the heading *"Argument for Allowance of Writ of Certiorari."*

In each of said Decisions, we have, after the citation thereof, identified the State whose law was applied. A review of these cases indicates that, for example, in several instances the *Doctrine of Acquiescence* was honored. See *Penn v. Erie*, 302 F.2d 843; *Rouse v. Chicago R & P Co.*, 474 F.2d 1180; *Mis-*

souri-Pacific v. Arkansas Oak Flooring, 434 F.2d 575, and *Colonial v. Central*, supra. Although this well reasoned rule was called to the attention of the Fifth Circuit in the instant case, the Court chose to follow the teachings of *Booth-Kelly* to the contrary and applied Oregon law which does not recognize "*Acquiescence*" as does Georgia.

The District Judge in the instant case, whose Findings of Fact were adopted by the Court of Appeals and whose Conclusions of Law were approved by the Fifth Circuit, addressed himself to the Doctrine of Acquiescence as aforementioned in his Memorandum Order, Appendix "B" of the Addenda hereto, advising in said self-serving Decision written for him by Central's counsel as follows:

> In its effort to limit Central's recovery to 50 per cent, Riegel has advanced the doctrine of acquiescence. This doctrine finds application in those cases where the unsafe condition is in the nature of a permanent structure which has been placed too close to the track in violation of the clearance provisions of a side track agreement and the condition has existed for a significant period of time. *Pennsylvania Railroad Co. v. Erie Avenue Warehouse Co.*, 302 F.2d 843 (3rd Cir. 1962), is typical. There, the railroad employee was killed when his head became wedged and was crushed between the side of a moving boxcar and a concrete retaining wall, the lateral clearance being less than 3 feet at the point where the employee was killed. The condition had existed for more than two years prior to the accident. The Court said:
>
> > We think the conclusion is required by the present record that the railroad had been adequately alerted to the dangerous condition which caused this accident long before the mishap occurred.
>
> 302 F.2d 843, 849.

There is no correlation between the circumstances in that case and the one before the Court. *The only inference to be drawn from the evidence as to the existence of the dirt and debris which caused Steed's accident is that it was not present two days before when the switching movement was safely made* and that it was the result of the tracks being immersed in water the day before, a condition noted by Riegel's safety director, and the vehicular traffic which traversed the area thereafter. Central cannot be charged with "acquiescence" in the existence of the condition which caused the derailment.

As set forth in the finding of facts 2(d) there is no evidence that prior to the derailment any member of the train crew other than Steed saw or was in a position to see the accumulation of dirt and debris which caused the accident. Riegel argues that the conductor, McLendon, should have examined the entire CFP track before permitting cars to be switched into that track. Each member of the train crew was an invitee on Riegel's premises and under no duty to assume negligence on the part of Riegel in maintaining the track. *If, in fact, McLendon had walked down the track prior to the derailment he could have been charged with actual or imputed knowledge of the condition and the case would then be within the ambit of Colonial Stores, Inc. v. Central of Georgia, 279 F.2d 777 (5th Cir. 1960).* In applying the same indemnity provision as in this case, the Court there limited the railroad's recovery to 50 per cent in view of proof that the *conductor walked the length of a platform a few minutes prior to the accident in which an employee of the railroad fell due to an accumulation of foreign substances on the platform. Under that proof, knowledge of the presence of the condition was imputed to the engineer*. There is no such evidence in this case and there is no proof that any member of the crew, in carrying out the switching movement, should have positioned himself

other than where the testimony showed him to be. Finding of Fact 2(d) is depositive of Riegel's contention directed to the conductor and Finding of Fact 2(f) is depositive of any contention regarding the movement of the cut of cars by the engineer.

(Emphasis Supplied)

The foregoing contention of the Trial Court written by Railroad's counsel and followed blindly by the Fifth Circuit is erroneous on its face for that it asserts the Acquiescence defense for Side Track cases is only applicable where the *"unsafe condition complained of is in the nature of a permanent structure which has been placed too close to the track in violation of the clearance provisions on a Side Track Agreement and the condition as existed for a significant period of time"*, citing *Penn. R. Co. v. Erie*, supra. However, *Colonial Stores, Inc. v. Central*, supra, also cited above and in which the law of Georgia relating to the Doctrine of Acquiescence was applied *involved no permanent structure which had been placed too close to the track in violation of clearance provisions but a situation where the Court there, in a non-jury trial, concluded as a matter of law:*

"The Court concluded, as matters of law, that Colonial was negligent in causing or permitting vegetable leaves and crushed ice or water to accumulate on the platform; *that Central was negligent in requiring Jones to step from the moving train to the unsafe platform and in failing to warn him after the conductor had inspected the platform and knew, or should have known, of its condition;* that the negligence of Colonial and Central jointly and concurrently caused the injury to Jones resulting in the liability to him of Central; that the negligence of each was active and primary; and that under the indemnity agreement the loss sustained by Central should be borne equally by Central and Colonial. • • •."

It is significant that in the *Colonial* case, the *"joint and concurring negligence"* of Central consisted in the failure of the Railroad's conductor to warn its injured workman after he *"knew or should have known of the unsafe condition of Colonial's* loading platform where the switchman would walk. One of our complaints in this Appeal is that both the District Judge and Court of Appeals refused to apply principles of *"Constructive Knowledge"* which obtain in Georgia under that State's *"Avoidance Rule"*, Georgia Code, Sec. 105-603, explained by the Fifth Circuit in *Gross v. Sou. R. W. Co.*, 414 F.2d 292 (1969) at 302. While Riegel insists that it was, under *Erie* (*this being a diversity case*), entitled to have the law of Georgia favorable to it applied in the premises, *the situation in respect to whether or not the conduct of Central is to be measured on the basis of what it knew or should have known is the same in FELA cases*, as Petitioner will hereinafter demonstrate.

The Court of Appeals, in its refusal to recognize relevant Georgia law and by adopting the proof requirements of the Federal Employers Liability Act, disregards its own ratification of the reasoning of District Judge Cox in *Ill. Cent. RR Co. v. Standard Oil Co.*, 292 F.Sup. 337, affmd. 403 F.2d 1022, 5th Cir. 1968, another one of the many cases involving the claim of a Railroad for indemnity from an Industry on account of its liability to an employee under the Act and wherein the Spur Track Agreement sued upon is the same as here. In the non-jury case mentioned, the Trial Judge wrote:

"The Railroad prepared this Sidetrack Agreement and nothing may be imported therein by way of enlargement of any duty or obligation imposed upon the defendant by the Agreement as executed • • •

The indemnity clause in this Spur Track Agreement was prepared by the railroad and all reasonable doubts in its application must be resolved against its author."

In the light of the foregoing, we suggest that Central, if it would hold Riegel to the liberalities of the FELA, should have spelled out such intention. If it did not contemplate that the rights and liabilities of the Railroad and the Industry should be governed by prevailing Georgia law where the contract was executed and to be performed, Central had opportunity to signify such. *It did not.*

Unfortunately for Riegel in the case sub judice, the Fifth Circuit not only failed to accord said Industry the benefit of the Georgia law due it, such as the Acquiescence Doctrine, it also short-changed Petitioner in respect to FELA law favorable to it. As an illustration, in its Opinion the Court states the following conclusion relative to the conduct of the parties:

> "It is clear that the accumulation of dirt and debris on the track area for which Riegel was responsible was the cause of the derailment and subsequent injury and that, prior to the derailment, *no member of Central's crew other than Steed, saw or was in a position to see the accumulation which caused the derailment.*"

By the foregoing, the Fifth Circuit ignores the *constructive knowledge* of the railroad concerning unsafe conditions to which its workmen may be perilously exposed and in which connection it is stated in *Patterson v. Norfolk & Western Ry. Co.*, 489 F.2d 303, 6 Cir., 1973, as follows:

> "*The railroad insists that liability can arise only if it should happen to acquire actual knowledge of the existence of the disease in an employee,* or special knowledge from the use of which it can reasonably perceive the potential for danger. 'Then and only then,' it is insisted, 'does the duty of ordinary care for the safety of other employees arise.'
>
> [1-3] *We are unable to find support for this restrictive view of a railroad's duty under the F.E.L.A.* Case law clearly establishes that under the Act liability for negligence attaches if the railroad *'knew or by the exercise of due care should have known'* of the danger or risk to an employee. Urie v. Thompson, 337 U.S. 163, 178, 69 S.Ct. 1018, 93 L.Ed. 1282 (1948). * * *
>
> * * * *The trial court properly rejected instructions which would have gone beyond this measure of care and would have required the jury to find actual knowledge of the disease or knowledge of special facts from which the railroad could reasonably perceive the potential for danger.* * * *.

The Fifth Circuit forgets that only six years ago it endorsed constructive knowledge in *Nivens v. St. Louis S. W. Ry. Co.*, 425 F.2d 114 (1970) which was a case under the Federal Employers Liability Act where it was ruled that the Railroad was responsible not only for what it knew but could have known in the exercise of reasonable care. In *Miller v. Cincinnati, N.O. & Texas-Pacific Ry. Co.*, 317 F.2d 693, 6 Cir. 1963, the Court correctly observes:

> "Under familiar law, defendant could not be convicted of negligence absent proof that such defect *was known, or should or could have been known by defendant, with opportunity to correct it.* * * * This rule is applicable to FELA actions where negligence is essential to recovery. * * *. *The establishment of such an element, however, may come from proof of facts permitting a jury 'inference' that the defect was discovered or 'should have been discovered'*, by the exercise of resaonable care or inspection." (Emphasis supplied.)

In the instant case, the failure of Central's Conductor and Engineer to have discovered what the Railroad contends was a dangerous condition on the track where Steed was injured is not cured by their testimony that they were not in a position to see what was ahead of the train which was being pushed

into the Riegel siding and, therefore, did not see the condition of the track where the derailment occurred. *The inquiry is whether or not they should have seen it, in the exercise of reasonable care, during the 30 minutes of switching operations carried on by them in close proximity to the place of the accident before it eventuated.* The exhibits offered into evidence show the location of all obstructions near the track and portray a panorama from which the jury could have inferred members of Central's train crew were negligent in not having seen the hazardous condition complained of. *Moreover, the credibility of these biased witnesses was for the jury.* These factors, coupled with the Fifth Circuit's failure to apply the Constructive Knowledge requirement, as advanced in the aforementioned cases, deprived Riegel of jury resolution of this factual issue as guaranteed by the Constitution.

Hopefully, we have demonstrated that the problem of compliance with FELA standards of proof and negligence was considered by the Court and, as reflected by its Opinion herein, in a discriminatory manner, detrimental to Petitioner, because principles peculiar to said Act were not applied uniformly to the rights and liabilities of both parties. Their place in the case, as drawn from the Court's Opinion, is difficult of ascertainment and the writing of the Court below in this regard breeds confusion instead of shedding light on the subject. In any event, their application by the Fifth Circuit is in direct violation of *Erie*.

We agree that in diversity cases brought under the Act Federal law is to apply or at least Decisions of Federal Courts relating to sufficiency of proof and issues of negligence in FELA actions are to be followed. *Here, however, we are dealing with a diversity suit concerning a controversy over the contractual rights and liabilities of corporations which are artificial citizens of different States, not the remedy of a railroad workman in a suit brought by him under the Federal Employers Liability Act.*

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, should, therefore, be honored. Seeing to it that the State law is properly applied in accordance therewith is, we submit, a ground for the issuance of writ by this Court of present day importance. Cyclopedia of Federal Procedure. Vol. 13, § 60.159 at page 529.

The Court also does violence to Petitioner's rights under the Erie Doctrine by holding incorrectly as follows:

> "The Trial Judge was * * * correct in concluding that Central's liability to Steed, as determined in the State Court action, was based on its non-delegable duty to provide its employee with a safe place to work pursuant to the standards of the FELA".

The above conclusion completely omits consideration of the fact that Count One of the Complaint in Steed's FELA suit against Central contained the averment by the plaintiff therein, *"That all of his aforesaid injuries and damages proximately resulted, in whole or in part, from the negligence of the officers, agents, or employees of the defendant (Railroad) while acting within the line and scope of his employment by the defendant (Central)".*

It is to be noted that the foregoing constitutes a direct charge of negligence on the part of the Railroad's own employees and does not impute vicarious liability to Central on account of the conduct of the Industry in discharging the Railroad's admittedly non-delegable duty to exercise reasonable care in furnishing or maintaining a reasonably safe place for Steed to perform his work. It is noteworthy that Count Two of Steed's Complaint which is in the nature of an allegation that Central breached its duty to furnish him with a safe place to work does not aver that it did so via the negligence of Riegel and it would be speculative for any Court to so interpret Count Two. *It is also to be borne in mind that nowhere in the pleadings in the*

State Court case, i.e., Complaint, Demurrer, and Answer nor in the Court's Charge to the Jury, is there any reference whatsoever to Riegel or an allegation of negligence on the part of said Industry. Conversely, in Count One of the Complaint at least, the negligent actors are specifically identified as being officers, agents, or employees of the defendant Railroad.

Under Alabama pleadings and practice, a general verdict *such as was rendered by the Jury in Steed's suit is referable to any good Count of the Complaint.* This has long been and remains the law of this State commencing with the Decision of the Alabama Supreme Court in *Tippen v. Petty*, 7 Porter 441 in 1838, and continuing in *Wilson v. Dudley*, 76 So.2d 509 where the Court of Appeals of Alabama advises:

> "There was a general verdict which did not refer to any particular count in the complaint. In this state of the record the verdict will be referred to a good count which is supported by the proof. Jones v. Belue, 241 Ala. 22, 200 So. 886, * * *."

In addition to the foregoing authority, see *USF&G v. Miller*, 235 Ala. 340, 179 So.2d 239, and *White v. Jackson*, 36 Ala. App. 643, 62 So.2d 477. Reference to the Federal cases show the Rule to be the same as in Alabama, in which connection see *Ratigan v. N. Y. Cent. RR Co.*, 291 F.2d 548, and *Cheffey v. Penn. R. Co.*, 79 F.Supp. 252, the latter case being analogous to the instant situation and from which we quote as follows:

> "The jury found for plaintiff; in answer to interrogatories found that defendants failed to furnish plaintiff with a reasonably safe place to work and that such failure was a cause of the accident; * * * Although, just as plaintiff was about to rest her case, an amendment was offered and, over defendant's objection, allowed, whereby plaintiff averred negligence of defendant in failing to provide

> plaintiff with sufficient help, no specific finding upon that ground was requested or made by the jury. *We must assume, however, that in the general verdict the jury also found for the plaintiff on that ground.*" (Emphasis supplied.)

In *Central v. Steed*, 287 Ala. 64, both Counts of the Complaint, which of course included Count One charging negligence on the part of the Railroad by and through its own employees, withstood the test of the Railroad's Demurrers and were held legally sufficient. At the conclusion of the evidence, Judge Windham submitted the case to the jury on each Count and expressly overruled Written Charges submitted by Central's counsel attempting to obtain the equivalent of a Directed Verdict for the Railroad. Moreover, in his Oral Charge the Court explained to the Jury that Count One was predicated upon the negligence of the Railroad acting by and through its employees. In this regard Judge Windham made the following statements concerning the two Counts of the Complaint:

> *"In the first one here, he alleges, in blanket form negligence on the part of employees of the railroad while working for the road and carrying out their duties for the road or negligence on the part of the road itself as a corporate entity or upon some superintendents or somebody above him while carrying out his duty for the railroad.*
>
> (Tr. p. 444, Central of Ga. v. Steed, 284 Ala. 64)

* * * * * * *

In characterizing negligence which might be attributable to the Railroad under Count Two, the Trial Court advised the Jury:

* * * * * * *

> "* * * if you found it was not set up and taken care of as the railroad should reasonably do, why then that would

be of course negligence if they were not handling their affairs there as would a reasonably prudent and reasonably careful railroad would under like circumstances. If they were not doing that that would be negligence."

(Tr. 448, Central of Ga. v. Steed, 284 Ala. 64)

It is obvious from the foregoing that the general verdict of the Jury in Steed's favor and against the Railroad in the State Court case, as affirmed by the Supreme Court, was a complete and final adjudication of negligence on the part of the Railroad by and through its own employees. We submit that the determination of what a prior judgment resolves and that which it does not adjudicate is a matter of substantive law to be decided by the Court and is not procedural; hence, regardless of the application of FELA standards, whether right or wrong in the instant case, if *Erie v. Tompkins*, supra, is respected as it should be, then the Fifth Circuit's ruling that Central was held liable to Steed by virtue of the breach of a non-delegable duty but through the acts or omissions of Riegel is in direct conflict with unbroken Decisions of the Supreme Court of Alabama which is another reason for the grant of Writ of Certiorari herein.

With reference to the foregoing, our basis for arguing that under *"Erie"* the law of Alabama is due to be applied in respect to the effect of the judgment in favor of Steed and against Central in the State Court is simply that since the case resulting in such judgment was tried, reviewed and affirmed in the Alabama Courts, the law of said State should be more significant as to just what was adjudicated therein. *We advise, however, that we have found no law in Georgia to the contrary and suggest that the Federal Decisions seem to follow Alabama in the premises.*

C

Has the Fifth Circuit Departed Drastically From the Accepted and Usual Course of Judicial Proceedings by Its Affirmance of This Case?

It is submitted that the application of FELA standards of proof and principles of negligence by the Court below to the conduct of Riegel does indeed constitute a radical variance from practice and procedure normally followed in Federal Courts and to a substantial degree impairs Constitutional privileges of the Petitioner. It is a unique situation which presents all sorts of problems when the quantum and quality of evidence sufficient to raise a jury question in a contract action is substantially altered so as to meet the minimal proof requirements of an injured railroad worker in a statutory suit under the Federal Employers Liability Act. *This legal gymnastic has in the instant case unduly damaged Petitioner for that the Decision of the Fifth Circuit premised on FELA principles drastically reduces Central's burden of proving "acts or omissions" of Riegel equating to negligence, a like advantage which said Court has not given the Industry as regards its claim of "joint and concurring negligence" on the part of the railroad under the "Equal Shares" clause in the Indemnity Agreement.* This violence to the rights of Riegel is compounded by errors of the Circuit below in several other particulars, including but not limited to the following:

(a) *It approves and adopts the Fact Finding by the District Judge as if this were a non-jury case wherein Findings of Fact are required under Rule 52(a) FRCP and ignores the undisputed and established fact that trial by jury was demanded by Riegel. (Deferred Appendix, p. 28)*

(b) It has held here that the granting by the Trial Judge of Central's Motion for a Directed Verdict in its favor

against Riegel is due to be sustained on the basis that there is no dispute in the evidence which would justify submission of the issues to the jury and despite the Record being essentially the same as that considered by the Fifth Circuit in *Steed v. Central of Georgia*, 477 F.2d 1303 (1973), wherein Summary Judgment pursuant to Rule 56 FRCP in favor of the Railroad on the same set of facts was reversed because of genuine issues for jury reconciliation therein.

(c) Both the Trial Judge and the Appellate Court below have dishonored the teachings of the Fifth Circuit in *Boeing v. Shipman*, supra, wherein it is postulated that *"On Motions for Directed Verdicts * * * the Court should consider all the evidence * * * but in the light and with all reasonable inferences most favorable to the party opposed to the Motion."*

(d) The Court of Appeals and the District Judge have also refused to recognize the *"Reasonable Man Rule"* espoused by this Court in *Wilkerson v. McCarthy*, supra, and ratified by the Fifth Circuit in *Boeing*, which is to say an issue for the jury is presented where the testimony is *"of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment, might reach different conclusions."*

It is to be noted that although the Appeal to the Fifth Circuit was from a Directed Verdict in a jury trial, the Opinion of said Court is prefaced with the statements:

> *"Judgment was entered in accordance with Findings of Fact and Conclusions of Law entered contemporaneously therewith. We affirm.*
>
> * * * * * * * *
>
> ** * * The excellent summary of the evidence set forth by the District Court appears in the margin."*

"Findings of Fact and Conclusions of Law" are required *only* under Rule 52, FRCP which also provides that *"Findings of Fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witness". The Trial Judge's obligation and prerogative as above referred to, however, are confined to non-jury cases wherein it is his responsibility and privilege to weigh the evidence and the consideration of whether or not it creates a jury issue is not involved.* While we know of no prohibition against a District Judge making Findings of Fact in a jury case merely as his own personal observations and in a Memorandum Opinion, *it is really not his office to do so and they cannot be considered binding upon an Appellate Court.* We think perhaps the situation is well stated in *O'Brien v. Westinghouse Elec. Corp.*, 293 F.2d 1, as follows:

> "It is clear a motion under Rule 41(b) for dismissal at the end of plaintiff's case, that upon the facts and the law the plaintiff has shown no right to relief, is proper in a case without a jury. Upon granting such a motion the court shoud make findings of fact and conclusions of law pursuant to Rule 52(a), * * *. *It is equally clear that in a jury case the question only can be one of law.* Therefore the motion should be for a directed verdict as mentioned in Rule 59. * * *. *If the court grants it no findings of fact are necessary and upon review the evidence must be viewed in the light most favorable to the party against whom the motion is made.* * * *.
>
> "We will therefore treat the motion under Rule 41(b) in this case as one for a directed verdict and will disregard the findings of fact of the trial court, reviewing the entire evidence in the light most favorable to the plaintiff and giving him the benefit of all reasonable inferences which may be deduced from the evidence in his favor. Warlich v. Miller, 3 Cir., 1944, 141 F.2d 168, * * *. *To adopt any other view in a jury case is to risk the deprivation of*

a plaintiff's right to trial by jury under the Seventh Amendment. Galloway v. United States, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458." (Emphasis supplied)

The law of this case was handed down by the Fifth Circuit in *Steed v. Central of Georgia*, 477 F.2d 1303 wherein a Summary Judgment which Central had secured against Riegel on the basis of there being *"no genuine issue as to any material fact"* was set aside with the observation that the Railroad had not met its burden of proving this essential factor. *The legal and factual issues raised in this Appeal are indistinguishable from those raised in Steed v. Central of Georgia, supra; hence, it is hard to understand why the results in the two trips which Petitioner has taken to the Court of Appeals are not uniform.* Judge Markey, the writer of the Opinion which Petitioner seeks to reverse, attempts to reconcile this rather remarkable turnabout, arguing that in the Summary Judgment case the Court could determine neither the facts considered important nor the rational supporting the grant of judgment, claiming that in the present Appeal the Trial Court's Memorandum Decision hereinbefore mentioned in which he delineated the evidence and made Findings of Fact and Conclusions of Law accounts for the different result in the two appeals. He also points out that at the trial on remand, *"Riegel had opportunity to conduct a searching cross-examination of Griffin, the Railroad's Acting Train Master who investigated the accident in which Steed was injured,"* and suggest this as a reason the Railroad was entitled to the direction of a judgment in its favor subsequent to reversal of the Summary Judgment as aforementioned.

The foregoing reasoning is not only specious and illogical, but also without judicial precedent. It constitutes an inconsistent, contradictory and repugnant interpretation of the office of Rules 50 (Summary Judgment) and 56 (Directed Verdict) of the Federal Rules of Civil Procedure, Professors Wright and Miller, making a comparison of these two rules in their work, Federal Practice and Procedure, Vol. 10, § 2713, observe:

"* * *, the most obvious distinction between a motion for summary judgment and one for a directed verdict is the timing of the two motions. * * *

Nonetheless, both motions have significant points of similarity. For example, *the moving party under Rule 56, as well as under Rule 50 has the burden of showing that there is no genuine issue of material fact that needs to be resolved by the jury. Moreover, on both a Rule 56 and a Rule 50 motion all inferences are drawn in favor of the nonmoving party.*

Both motions also call upon the court to make basically the same determination—*that there is no genuine issue of fact and that the moving party is entitled to prevail as a matter of law.*" (Emphasis supplied)

In *Boeing v. Shipman*, supra, the case where less than a decade ago the Fifth Circuit refused to apply Federal Employers Liability Act standards in a non-FELA action, as it has done here, it declares that *"On motions for directed verdicts * * * the Court should consider all of the evidence * * * but in the light and with all reasonable inferences most favorable to the party opposed to the motion."* See also *Galloway v. U. S.*, 319 U.S. 372, 63 S.Ct. 1077 and Judge Tuttle's advice in *United States v. Bryan*, 265 F.2d 698, 5th Cir. 1959, as follows:

> *"On a motion for directed verdict, the evidence must be viewed in the light most favorable to the party opposing the motion, giving him the benefit of every favorable inference which may be fairly drawn. Atlantic Greyhound Corp. v. Crowder, 5 Cir., 177 F.2d 633. * * *."*

If this Court can spare the time to read the short selection of excerpts of testimony taken from the Record in this case and incorporated in the Addenda hereto as Appendix "E", it will find, beyond peradventure of doubt, that Petitioner was not

accorded the benefit of legitimate inferences in a light favorable to it by the Courts below and that by any and all standards of proof recognized in Federal jurisprudence, be they those of the Federal Employers Liability Act or otherwise, the issues of *"joint and concurring negligence"* of the Railroad as a contributing cause to Steed's accident and the *"acts or omissions"* of the Industry which would equate to negligence proximately causing the same should have been submitted to the jury.

The *"Reasonable Man Rule"* relating to the sufficiency of the evidence for jury submission hereinbefore referred to has been uniformly adopted by all Courts of this Country, Federal and State. Reference to Wright & Miller's Federal Practice and Procedure, Vol. 9, § 254, pages 540-547 reflects that the Fifth Circuit perhaps more than any of the others, or all combined, has paid lip service, at least, to the premise that if the evidence in a case is *not such* that there can be but one conclusion as to the verdict that all reasonable men could have reached, then it should be submitted to a jury. The sense of this standard is that if a factual situation is such that the minds of reasonable men might differ as to the effect of the same, i.e., if the mind of one reasonable juror might conclude "This is negligence or this is not negligence" despite a different opinion of his peers, then the case is not one for a Directed Verdict but should be submitted to the jury. *Stated another way, the facts as proven must be free from all inferences on account of which reasonable men, in their own minds, might be in disagreement but, on the contrary, must be such that their minds would be of one accord in order for the withdrawal of a case from the jury and the direction of a verdict to be proper.* This is the rule which the Fifth Circuit has endorsed in *Boeing v. Shipman*, supra, and *Trawick v. Manhattan Life Ins. Co.*, 447 F.2d 1293 (1971). Other Circuits have followed suit and this is also the teaching of the Supreme Court of the United States. *In the case at Bar, however, the Court of Appeals disregards the mandate of its own Decisions and refuses to apply the Reasonable Man test.*

It doing so, it departs from the accepted and usual course of judicial proceedings and is in conflict with its own Decisions and those of other Courts in such manner as to call for an exercise of the power of review and supervision of the Supreme Court via Certiorari as prayed for by the Petitioner herein.

CONCLUSION

After having taken too many pages in our attempt to do it, hopefully we have persuaded the Court this is an unusual case, an important case involving significant issues concerning which the Supreme Court should have considerable interest, and a case in which the valuable rights guaranteed Petitioner by the Constitution of the United States, such as a jury trial and due process, have been violated. The Fifth Circuit has strayed far afield from the accepted and normal course of judicial proceedings and, in doing so, attempted to decide an important question under the Federal Employers Liability Act which has not been, but should be, settled by the Supreme Court.

Petitioner accordingly prays that Writ be issued.

Respectfully submitted.

LONDON, YANCEY, CLARK & ALLEN

By JAMES E. CLARK
Suite 2100
First National-Southern Natural Building
Birmingham, Alabama 35203
205-251-2531
Attorneys for Petitioner

Certificate of Service

I certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed, postage prepaid, to Mr. Will Sadler, Jr., Sadler, Sadler, Sullivan & Sharp, 1750 First National-Southern Natural Building, Birmingham, Alabama 35203.

This 27th day of September, 1976.

James E. Clark
Of Counsel

"ADDENDA"

Appendix "A":

Opinion of Fifth Circuit in *Steed v. Central of Georgia*, 529 F.2d 833

Appendix "B":

Memorandum Decision of U. S. District Court for Northern District of Alabama Filed July 16, 1974 in *Steed v. Central of Georgia*, 529 F.2d 833, as Abstracted From Deferred Appendix Therein, Pages 44-47, 50-57

Appendix "C":

Opinion of Fifth Circuit in *Steed v. Central of Georgia*, 477 F.2d 1303

Appendix "D":

Opinion of Supreme Court of Alabama in *Central of Georgia v. Steed*, 287 Ala. 64, 248 So.2d 110

Appendix "E":

Selected Excerpts From the Transcript of the Evidence in *Steed v. Central of Georgia v. Riegel*, 529 F.2d 833, as Abstracted From the Deferred Appendix Therein, Showing the Source Thereof and for the Court's Comparison With the District Judge's Summary of Evidence Approved, Adopted and Footnoted by the Fifth Circuit at 529 F.2d 835-836.

APPENDIX "A"

J. P. STEED, Plaintiff,

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, Defendant-Third Party Plaintiff-Appellee,

v.

RIEGEL TEXTILE CORPORATION, Third Party Defendant-Appellant.

No. 74-3157.

United States Court of Appeals, Fifth Circuit.

April 5, 1976.

Rehearing and Rehearing En Banc

Denied June 28, 1976.

A railroad brought action against a textile company under a sidetrack agreement containing an indemnification clause. A summary judgment in favor of the railroad was reversed and remanded, 477 F.2d 1303. After trial on remand, in the United States District Court for the Northern District of Alabama, at Birmingham, Frank H. McFadden, Chief Judge, the railroad again recovered, following directed verdict. The textile company, owner of the sidetrack, again appealed. The Court of Appeals, Markey, Chief Judge, sitting by designation, held that the phrase "acts or omissions" in the indemnity clause meant

wrongful or negligent acts by the textile company which would create liability on the part of the railroad and the textile company's liability was to be determined under the law which would make the railroad liable to its employees, and not upon the textile company's common-law liability. The textile company could have taken over and defended the charges against the railroad and having chosen not to do so, was bound by the result, in absence of fraud or collusion. In view of the railroad's liability to its employee being based on its nondelegable duty to provide its employee with a safe place to work, and in view of the textile company's contractual duty to maintain its track, evidence failed to make a case for the jury on the railroad's joint or concurring negligence, which would have brought into play a provision, of the indemnity agreement, for equal sharing of any claim or liability arising from joint or concurring negligence.

Decision affirmed.

1. Indemnity key 8.1(3)

Phrase "acts or omissions" in indemnity clause of sidetrack agreement meant wrongful or negligent acts by textile company which would create liability on part of railroad, and textile company's liability was to be determined under law which would make railroad liable to its employee, for failure to provide safe place to work, and not upon textile company's common-law negligence. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 1 et seq.

2. Federal Civil Procedure key 1938

Pretrial order supplemented allegations of initial complaint and governed pattern of lawsuit. Fed.Rules Civ.Proc. rule 16, 28 U.S.C.A.

3. Indemnity key 14

Indemnitor could have taken over and defended charges against indemnitee, and having chosen not to do so, was bound by result, in absence of fraud or collusion.

4. Indemnity key 8.1(5)

Where indemnitee's liability to its employee was based on its nondelegable duty to provide its employee with safe place to work, mere fact that indemnitee was liable to its employee did not bring into play a provision of indemnity agreement whereby, if claim or liability arose from joint or concurring negligence, it was to be borne by parties equally.

5. Indemnity key 15(9)

In action by indemnitee railroad against indemnitor under sidetrack agreement, in view of indemnitee's liability to its employee for failure to provide safe place to work and in view of evidence of indemnitor's failure to fulfill contractual duty of maintaining its track on which injury occurred, evidence failed to make case for jury on indemnitee's joint or concurring negligence, which would have brought into play provision of indemnity agreement, for equal sharing of claim or liability arising from joint or concurring negligence.

6. Indemnity key 9(1)

Railroad was under legal duty to pay medical expenses to injured employee, in mitigation of damages, and was entitled to recover same under indemnity agreement with owner of sidetrack.

James E. Clark, Birmingham, Ala., for Riegel Textile Corp.

W. H. Sadler, Jr., Birmingham, Ala., for Central of Georgia.

Al G. Rives, Birmingham, Ala., for J. P. Steed.

Appeal from the United States District Court for the Northern District of Alabama.

Before GEWIN and AINSWORTH, Circuit Judges, and MARKEY,* Chief Judge.

MARKEY, Chief Judge:

In this diversity case, third party defendant Riegel Textile Company (Riegel) appeals from a directed verdict in the total amount of $469,558.75 on the motion of third party plaintiff Central of Georgia Railroad Company (Central). Judgment was entered in accordance with findings of fact and conclusions of law entered contemporaneously therewith. We affirm.

Background

This suit is based on the indemnity clause of a Side Track Agreement (agreement), dated April 24, 1948, in effect between Riegel and Central at the time of the accident. The cause arose on December 30, 1966, when J. P. Steed, a trainman employee of Central was injured while riding on the side of the lead end of a cut of cars which were being shoved along a spur track owned and maintained by Riegel at Riegel's plant in Trion, Georgia. The car derailed causing Steed to be caught between the side of the car and a loading platform which ran parallel to the track. Steed's left leg was amputated below the knee and his right leg had multiple fractures.

On March 1, 1967, Steed filed a Federal Employers' Liability Act (FELA) suit against Central in the Circuit Court of Jef-

* Of the U. S. Court of Customs and Patent Appeals, sitting by designation.

ferson County, Alabama. His first count charged the railroad with negligence of its officers, agents or employees while acting within the line and scope of their employment or by reason of a defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, works or other equipment. A second count charged negligence in failing to exercise reasonble care to furnish or maintain a reasonably safe place to work.

Central sent Riegel a notice of the suit and a request to defend. On December 9, 1968, anticipating its liability to Steed, Central filed a third party complaint against Riegel, claiming under the indemnity clause of the agreement. The agreement provides in pertinent part as follows:

> 2. The tenant (Riegel) will pay for, own, maintain the entire track from the point of switch to the end of the track. . . .
>
> * * * * * * *
>
> 4. If the tenant fails to maintain said track in safe operating condition as prescribed by the Railway, the Tenant agrees that the Railway may put it in repair at the Tenant's expense, or may discontinue operating thereover.
>
> * * * * * * *
>
> 9. The Tenant also agrees to indemnify and hold harmless the Railway from loss, damage or injury from any act or omission of the Tenant, its employees or agents, to the person or property of the parties hereto and their employees and if any claim or liability other than from fire shall arise from the joint or concurring negligence of the parties hereto, it shall be borne by them equally.

On Riegel's petition, the entire case was removed to the federal court, which thereinafter entered an order remanding the original complaint to the state court but retaining jurisdiction over Central's third party complaint for indemnification. We affirmed, *Central of Georgia Railway Co. v. Riegel Textile Corp.*, 426 F.2d 935 (5th Cir. 1970).

The trial of the FELA case in the state court resulted in a judgment against Central for $500,000, which was reduced by remittitur to $300,000 and accepted by Steed. On Appeal, the Alabama Supreme Court affirmed, *Central of Georgia v. Steed*, 287 Ala. 64, 248 So.2d 110 (1971). The railroad's liability to Steed having been established, the district court granted summary judgment for Central on its third party complaint. This court reversed. *Steed v. Central of Georgia Railway Co.*, 477 F.2d 1303 (5th Cir. 1973).

In the trial on remand, Central introduced the complete record of the state court trial, the deposition taken in this case of A. T. McLendon, its conductor; Rufus Everhart, its brakeman; James B. Long, who was Riegel's Safety Director at the time of the accident, none of whom testified at the Steed trial, and the deposition of W. A. Russell, its engineer who did testify in that trial. In addition, Central's acting trainmaster at the time of the accident, B. F. Griffin, testified in person. Riegel introduced two operating rules but offered no testimony. The excellent summary of the evidence set forth by the district court appears in the margin.[1]

---

[1] The train on which Steed was working at the time of his accident was a local freight, No. 99, which operated between Cedartown, Georgia, and Chattanooga, Tennessee. The spur track of Riegel leads off of the railroad main line to a switch lead with two branch tracks, one known as the "coal track" and the other the "CFP track." The accident occurred on the "CFP track." The engine, with a boxcar and a tank car ahead of it, moved into the coal track and connected to three loaded and two empty cars. These cars were pulled from the coal track, the two empties placed on the CFP track and the three loaded cars returned to the coal track. The engine then pulled out to the switch lead and with four cars ahead of it began shoving the train down the CFP track to connect to a boxcar standing at the lower end of that track. This car had been placed there two days before by a crew of which Steed was a member.

J. P. Steed testified in the State court that at the time of the accident he was 22 years old; that he had been employed by the Central of Georgia as a trainman for about 2½ years, during which time he had performed some duty in and about the CFP track on 100 to 150 occasions. No car on which he had ridden had ever derailed on the CFP track nor had he ever heard of one having done so. Steed testified that on the occasion of the accident he was riding on the side step of the lead hopper car; that, by the use of a radio, he directed the train movement by calling to the engineer the distance in car lengths separating the lead car from the boxcar to be coupled. Steed testified that as the cars moved down the track, the track looked safe and its general appearance was the same as it always had been. He estimated the speed of the movement at 2 or 3 m. p. h. Steed said that he called out to the engineer that they lacked five car lengths, then four, three, two, at which point he heard rocks grinding, looked down and saw the wheels off the tracks. He tried to jump to the platform but was already caught between it and the car.

At the Steed trial, the deposition of Willie S. Wilbanks was read. He had been employed by the Riegel Company for 21 years. He was standing near a small boiler house near the CFP track. He did not see the car as it derailed, but heard Steed "holler", looked up and saw him caught between the car and the platform. He stated that he looked at the point of the derailment and saw "dirt and gravel" which covered the rails and expressed the opinion that trucks which used the road bed in moving to and from the area had knocked the dirt up on the rail. According to his testimony, no crew member other than Steed was in a position to see the debris. The speed of the

Opinion

Riegel argues that the trial court's directed verdict must be reversed because it is based on the evidence on which the erroneously granted motion for summary judgment was based, supplemented only by the testimony of Griffin. Regarding that testimony, Riegel contends:

> that this additional evidence from Griffin changes the circumstances already reviewed by this Court only in the sense that his ore tenus testimony, if anything, further controverts the factual issues which were withdrawn from the Jury.

We cannot agree. In the prior appeal, it was pointed out that this court, on the record then before it, could determine neither the facts considered important below nor the rationale supporting the grant of summary judgment. In the present appeal, the

record includes Judge McFadden's memorandum decision in which he delineated the evidence and made findings of fact and conclusions of law. Moreover, at the trial on remand Riegel had opportunity to conduct a searching cross-examination of Griffin concerning his investigation of the accident. In the prior appeal, Riegel argued that summary judgment denied him that opportunity. For these reasons, Riegel's effort to equate this appeal with that which considered the summary judgment must fail.

Nor can we agree with Riegel that Central must show negligence on the part of Riegel constituting the proximate cause of Steed's injury. In referring to the agreement, which provides that Central be indemnified for "loss, damage or injury from any act or omission of the Tenant," Riegel would have us equate "any act or omission" with common-law negligence.

---

movement, according to Wilbanks, was about the same as on prior occasions which he estimated was 5 to 10 m. p. h.

The engineer, W. A. Russell, who testified in the Steed trial and whose deposition was read in this trial, stated that as the cut of cars moved down the CFP track their speed was 2 or 3 m. p. h.; that he heard Steed call out "5", "4", "3" car lengths, but did not hear him call out "2" car lengths and that after he moved about one more car length and did not hear from Steed he applied his brakes and stopped with 4 or 5 feet. Russell further testified that at the speed the cars were moving, there was nothing unusual about his not having heard Steed call out "2" car lengths. He did not look at the condition of the rails after the accident, his attention being centered on Steed and his condition.

Mr. C. P. Shell, Jr., testified in the Steed trail. He was trainmaster of the Cedartown district which included the Riegel plant at Trion, Georgia. At the time of Steed's accident, he was sick and B. F. Griffin was acting in his place. As trainmaster he visited the Riegel plant four or five times a year and had observed the condition of the CFP tracks. To his knowledge, no repairs had been made to that track by the Central of Georgia.

The deposition of the conductor, A. T. McLendon, was read in this trial. As conductor, he directed the movement of the cars into the coal and CFP tracks. He testified that at no time during the switching operation was he at a point where he could observe the track where the accident occurred. He made no determination of

[1] The trial judge found that there was dirt and debris covering the track which Riegel was under a *contractual duty* to maintain, and that the presence of the dirt and debris was the proximate cause of Steed's accident. No substantial evidence was offered to contradict those findings. It was further concluded that Riegel's liability to Central, under the indemnity agreement, must be determined by the law making Central liable to Steed. In other words, if Central was found liable to Steed in the prior action based upon its nondelegable duty to provide a safe place to work, then Riegel would be liable under the indemnity agreement. The position of the trial judge on this point is correct and finds support in the case law.

---

what caused the derailment and so stated in his report. He testified he did not look under the car to determine what actually caused the wheels to go off the rail.

The deposition of brakeman, Rufus Everhart, was read in this trial. He did not see the area of the derailment prior to the accident and at the time it occurred he was on the third car from the end knocking off hand brakes. He did not see the condition of the rail which caused the derailment.

The deposition of James P. Long, Riegel's safety director at the time of Steed's accident, was read in this case. He was familiar with the provisions of the contract between Riegel and the Central of Georgia. The track in question was cleared by Riegel as the need arose as determined by Riegel's safety inspectors, members of its safety committee or by the witness. The day before the accident the tracks were immersed in water; the last time he saw them clear was two days before the accident. Long further testified that trucks of necessity had to drive down the railroad track to get to the area where construction work was going on.

B. F. Griffin, the acting trainmaster, testified in person at the Steed trial and in this trial. He arrived at the scene about four hours after the accident. He testified that he found dirt, mud and rocks which covered the rails for a distance of 4 or 5 feet and that there were markings in the debris where the wheels had mounted the rail. He inspected the wheels of the car with a flange gauge and found that there were no defects in the flanges. He also found the side steps and the grab irons were intact; they were not bent or loose. Referring to records of the railroad, he testified that two cars had been moved out and one car in on the CFP track two days before Steed's accident.

In *Chicago R. I. & P. R. Co. v. Dobry Flour Mills, Inc.*, 211 F.2d 785, 788 (10th Cir. 1954), the court commented with regard to an identical indemnity agreement:

> We construe the "acts or omissions" referred to in the indemnity clause of the contract to mean the wrongful or negligent acts by Dobry (the industry) which would create liability on the part of the Railroad. Consequently, under the provisions of the contract Dobry's liability is to be determined under the law which would make the Railroad liable to Fruit (the employee), and not upon Dobry's common law liability . . ..

[2] Riegel refers to the third party complaint wherein Central alleges that the accident in which Steed was hurt "occurred as a proximate result of the negligence of Riegel Textile Corporation in placing debris, or permitting debris to remain, on the track covered by said Track Agreement." But the argument that the quoted allegation of its initial third party complaint made it encumbent upon Central to prove that "defendant negligently failed to exercise reasonable care" is not on point. The pre-trial order herein supplemented the allegations of the initial complaint and governed the pattern of the lawsuit. Rule 16, F.R.C.P. See *Case v. Abrams*, 352 F.2d 193 (10th Cir. 1965).

[3] The trial judge was also correct in concluding that Central's liability to Steed, as determined in the state court action, was based on its nondelegable duty to provide its employee with a safe place to work pursuant to the standards of the FELA. No jury issue was raised in that regard. Both counts of Steed's complaint involve the track and roadbed condition as proximate cause of the injury. Riegel could have taken over and defended Steed's charges in that action. Having chosen not to do so, it is bound by the result, absent fraud or collusion. *Miller and Company of Birmingham v. Louisville and Nashville R. Co.*, 328 F.2d 73, 78 (5th Cir. 1964). We conclude,

therefore, that the state court's determination that Steed's conduct should not bar his recovery from Central must also be binding on Riegel.

Riegel alludes also to the agreement provision which reads, "[i]f any claim or liability other than from fire shall arise from the joint or concurring negligence of the parties hereto, it shall be borne by them equally," and contends that it limits Riegel's liability to 50% of Central's loss "if [Central's] negligence contributes to its liability." That general proposition was rejected in *Booth Kelly Lumber Co. v. Southern Pacific Co.*, 183 F.2d 902 (9th Cir. 1950). There the court, in construing an indemnity contract similar to the one before us, reasoned with respect to the indemnity paragraph:

> Basic in any determination of the meaning of this whole paragraph is an understanding that when the parties contemplated that there might be claims for indemnity they must have been cognizant of the fact that in the ordinary case the occasion for seeking indemnity would not arise unless the indemnitee had himself been found guilty of some fault, for otherwise no judgment could have been recovered from him. That this is typically true is recognized in the comment under Section 95, Restatement on Restitution, as follows: "In all of these situations the payor is not barred by the fact that he was negligent in failing to discover or to remedy the defect as a result of which the harm was occasioned; in most of the cases it is because of this failure that he is liable . . .." [183 F.2d at 907.]

The Georgia Court of Appeals is in accord. *Georgia Ports Authority v. Central of Georgia Railway Company*, 219 S.E.2d 467 (decided Sept. 3, 1975, *cert. denied* Sept. 29, 1975).

[4] Thus, Riegel's reliance on the mere fact that Central was liable to Steed cannot bring the "equal shares" provision

of the agreement into play. Central's liability to Steed, as indicated above, was based on its nondelegable duty to provide its employee with a safe place to work.

[5] Nor was there a jury issue established with respect to negligence on the part of Central which could have come within the "equal shares" provision of the agreement. It is clear that the accumulation of dirt and debris on the track area for which Rigel was responsible was the cause of the derailment and subsequent injury and that, prior to the derailment, no member of Central's crew, other than Steed, saw or was in a position to see the accumulation which caused the derailment. There was no substantial evidence from which a jury might have inferred that the engineer was guilty of any negligence which proximately caused the injury. It is additionally clear that there were no defects in the derailed car which might have caused or contributed to the derailment. There is thus no substantial evidence on any issue from which a jury might have determined that Central was entitled to anything other than full indemnity from Riegel.

[6] We are also in agreement with the trial court's decision upholding Central's right to recover the medical expenses it paid to Steed. Central was under a legal duty to pay those expenses in mitigation of damages.

Accordingly, the decision of the district court is in all respects affirmed.

APPENDIX "B"

Memorandum Decision of U. S. District Court for Northern District of Alabama Filed July 16, 1974 in Steed v. Central of Georgia, 529 F.2d 833, as Abstracted From Deferred Appendix Therein, Pages 44-47, 50-57

This suit is based on an indemnity contract dated April 24, 1948 between the Central of Georgia Railroad Company, plaintiff, and Riegel Textile Company, defendant.

On December 30, 1966, at approximately 1:00 P.M., Eastern Standard Time, an employee of the railroad, J. P. Steed, was riding the side of the lead end of a cut of cars which were being shoved along a spur track owned and maintained by the Riegel Company at its Trion, Georgia, plant. The car derailed. Steed was caught between the cars and a loading platform parallel to the track. Steed's left leg was amputated below the knee and his right leg had multiple fractures. Steed received emergency treatment at the Trion Hospital and was immediately transferred to a hospital in Chattanooga, Tennessee, where he was placed in intensive care for a few days and then placed in a private room for the remaining period of that admission, a total of 80 days. He was readmitted four additional times, the last discharge being January 28, 1968. The railroad paid all of Steed's medical expenses in the stipulated amount of $12,108.57, and thus no claim for these expenses was made by him in his suit against the railroad.

On March 1, 1967 Steed filed suit against the railroad in the Circuit Court of Jefferson County, Alabama. Notice of the suit and a request to defend was sent by the railroad to Riegel. Riegel had also received notice of the accident at the time it happened. Riegel declined to defend. On December 9, 1968, the railroad filed a third party complaint against Riegel claiming

indemnity under the indemnity contract in the event of its liability to Steed.

This contract in pertinent part provides:

> "2. The tenant (Riegel) will pay for, own, maintain the entire track from the point of switch to the end of the track . . .
>
> '4. If the tenant fails to maintain said track in safe operating condition as prescribed by the Railway, the Tenant agrees that the Railway may put it in repair at the Tenant's expense, or may discontinue operating thereover.
>
> '9. The Tenant also agrees to indemnify and hold harmless the Railway from loss, damage or injury from any act or omission of the Tenant, its employees or agents, to the person or property of the parties hereto and their employees and if any claim or liability other than from fire shall arise from the joint or concurring negligence of the parties hereto, it shall be borne by them equally.' "

As a result of rulings by this Court and the State court Steed's action against the railroad remained in the State court and the third party suit rested in this Court's pending a determination of the State court action. That trial was concluded in June, 1969, and resulted in a jury verdict and judgment for Steed in the amount of $500,000.00. The railroad's motion for a new trial was overruled, but a remittitur reducing the judgment to $300,000.00 was ordered and accepted by Steed. The railroad's appeal was affirmed by the Alabama Supreme Court on April 8, 1971 and the application for rehearing denied on May 6, 1971. *Central of Georgia v. Steed*, 287 Ala. 64, 248 So.2d 110 (1971).

On April 7, 1972, this Court granted the railroad's motion for summary judgment. The Court of Appeals reversed. *J. P. Steed v. Central of Georgia Railway Co.*, 477 F.2d 1303 (5th Cir. 1973).

In this trial, the plaintiff, Central of Georgia, introduced the complete record of the State court trial, the depositions taken in this case of A. T. McLendon, its conductor; Rufus Everhart, its brakeman; James B. Long, who was the defendant Riegel's Assistant Personnel Manager and Safety Director at the time of Steed's accident, none of whom testified in the Steed trial, and the deposition of W. A. Russell, its engineer, who did testify in that trial. In addition, the plaintiff's acting trainmaster at the time of the accident, B. F. Griffin, testified in person. Other than the introduction of two operating rules of the railroad, the defendant Riegel offered no testimony.

Except as to one item which will be discussed below, the amount of damages was stipulated.

At the close of the evidence, both parties filed written motions for a directed verdict.

* * * * * * *

(Summary of Evidence omitted, Deferred Appendix Pages 47-50 but footnoted in Steed v. Central, 529 F.2d 833, Pages 835-836. Appendix "A" hereto, Pages A-3 and A-4.)

* * * * * * *

In the State court, Steed's complaint was stated in two counts. The first charged the railroad with negligence of its officers, agents or employees while acting within the line and scope of their employment or by reason of a defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, works or other equipment. The second count charged negligence in failing to exercise reasonable care to furnish or maintain plaintiff a reasonably safe place to work.

Findings of Fact

1. By stipulation of the parties, the Court finds:

(a) That the contract between the parties dated April 24, 1948 was in force and effect at the time of the Steed accident;

(b) That the accident occurred on a portion of the track covered by the contract;

(c) That the medical expenses paid by Central in the amount of $12,108.57 were reasonable and were paid in an effort to improve Steed's condition and to mitigate damages and that they were not claimed by Steed in his State court action;

(d) That Central gave Riegel proper notice of Steed's action against it and tendered Riegel the defense of the action which Riegel declined;

(e) That if Central is entitled to recover, its total loss within the terms of the contract is $382,312.75 or $394,-421.32 plus interest from May 13, 1971 depending on the ruling of the Court as to whether Central's claim for medical expenses referred to in (c) above is proper.

2. From the record, the Court finds there is no substantial evidence contrary to the following findings:

(a) That by the terms of the contract Riegel was under a duty to maintain the track;

(b) That the derailment which proximately caused Steed's accident and injury resulted from an accumulation of dirt and debris which covered the rails of the track;

(c) That the presence of the dirt and debris was due to an act or omission of Riegel;

(d) That prior to the derailment no member of Central's train crew saw or was in a position to see the accumulation of dirt and debris which caused the derailment;

(e) That there were no defects in the derailed car which proximately caused or contributed to the derailment and Steed's injuries;

(f) That the engineer was guilty of no negligence which proximately caused or contributed to the accident and Steed's injuries;

(g) That Central's liability to Steed as shown by the State court record was based on its non-delegable duty to exercise reasonable care to furnish Steed a reasonably safe place to work set by the standards of the Federal Employers Liability Act.

Conclusions of Law

The plaintiff Central of Georgia's motion for directed verdict for full indemnity is due to be granted. It follows that Riegel's motion is to be denied.

The indemnity provision of the contract is in two parts: the first provides, "The Tenant (Riegel) also agrees to indemnify and hold harmless the Railway (Central of Georgia) from loss, damage or injury from any act or omission of the Tenant, its employees, or agents, to the person or property of the parties hereto and their employees and the person or property of any other person or corporation while on or about said track"; the second provides, "and if any claim or liability other than from fire shall arise from the joint or concurring negligence of the parties hereto, it shall be borne by them equally."

In support of its motion and in opposition to Central's, Riegel contends that Steed's verdict against the railroad conclusively establishes negligence on the part of Central which bars its right

to recover in its entirety or at most limits Central's recovery to 50 per cent. This identical contention was discussed and decided adversely to Riegel's position in *Booth-Kelly Lumber Co. v. Southern Pacific Co.*, 183 F.2d 902 (9th Cir. 1950). There the Court, in construing an indemnity agreement between an industry and a railroad containing provisions similar to the ones pertinent in this case, held that the rights of the parties were governed by the contract and not the rules of common law. The Court reasoned that the occasion for seeking indemnity would not arise unless the indemnitee had himself been found guilty of some fault, for otherwise no judgment could have been recovered against himself and therefore the prior judgment in favor of the employee against Southern Pacific would not bar its right to full indemnity pursuant to the first part of the indemnity contract.

In the employee action against it, Southern Pacific was held liable for a breach of its statutory duty under the Federal Employer's Liability Act to provide a reasonably safe place to work. Ruling that the railroad under the circumstances was entitled to full indemnity the Court, in *Booth-Kelly*, quoted with approval Section 95 of the Restatement of the Law of Restitution, "Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it is the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after the discovery of the danger, he acquesced in the continuation of the condition."

The railroad was allowed full indemnity against the indemnitee in *Baltimore & Ohio Railroad Co. v. Alpha Portland Cement Co.*, 218 F.2d 207 (3rd Cir. 1955). A railroad employee riding the lead end of a boxcar was injured when the car derailed as it went over a crossing within the industry's plant due

to an accumulation of frozen mud and ice higher than the rails. The railroad settled with the employee and brought suit against the industry based on identical indemnity provisions to those in *Booth-Kelly, supra*, and in this case. The Court found that the railroad's liability to its employee was based on its non-delegable duty to furnish him a safe place to work even though the place became unsafe through the act of a third party and without fault on its part. Citing *Booth-Kelly* and applying the same reasoning, the Court awarded the railroad indemnity in the full amount of its claim.

The test of Riegel's liability to Central is to be determined by the law which would make Central liable to Steed not upon Riegel's common law liability to either party. This was the explicit holding in *Chicago R.I. & P.R. Co. v. Dobry Flour Mills, Inc.*, 211 F.2d 785 (10th Cir. 1954). Interpreting an indemnity provision between the industry and the railroad identical to the one between Central and Riegel, the Court said:

> We construe the "acts or omissions" referred to in the indemnity clause of the contract to mean the wrongful or negligent acts by Dobry (the industry) which would create liability on the part of the Railroad. Consequently Dobry's liability is to be determined under the law which would make the railroad liable to Fruit (the employee) and not upon Dobry's common law liability, and the matter should have been submitted to the jury accordingly.

211 F.2d 785, 788.

In *Dobry* the railroad had settled with the employee and thus there had not been a determination of the railroad's liability to him. Here that determination has been made in the State court action and it was that the accumulation of dirt and debris was the cause of the derailment and that Steed's conduct, to whatever extent he may have been negligent, was not a bar to his recovery. Having had notice and afforded an opportunity to

defend, the State court judgment is conclusive on Riegel as to the matters litigated thereon. In *Miller and Company of Birmingham v. Louisville and Nashville R. Co.*, 328 F.2d 73 (5th Cir. 1964), the Court in construing a substantially similar indemnity provision said:

> The industry has the option to take its chances and await the possible event of the liability of the railroad becoming fixed and ascertained, *King v. Capitol Amusement Co.*, 1930, 222 Ala. 115, 130 So. 799. However, after notice and an opportunity to defend any judgment against the railroad will be conclusive against the indemnitor industry, unless obtained by fraud or collusion.

328 F.2d 73, 78.

The Court is of the opinion that the first part of the indemnity paragraph is applicable and that Central is entitled to full indemnity unless there is evidence of joint or concurring negligence chargeable to it.

In its effort to limit Central's recovery to 50 per cent, Riegel has advanced the doctrine of acquescence. This doctrine finds application in those cases where the unsafe condition is in the nature of a permanent structure which has been placed too close to the track in violation of the clearance provisions of a side track agreement and the condition has existed for a significant period of time. *Pennsylvania Railroad Co. v. Erie Avenue Warehouse Co.*, 302 F.2d 843 (3rd Cir. 1962), is typical. There, the railroad employee was killed when his head became wedged and was crushed between the side of a moving boxcar and a concrete retaining wall, the lateral clearance being less than 3 feet at the point where the employee was killed. The condition had existed for more than two years prior to the accident. The Court said:

> We think the conclusion is required by the present record that the railroad had been adequately alerted to the

> dangerous condition which caused this accident long before the mishap occurred.

302 F.2d 843, 849.

There is no correlation between the circumstances in that case and the one before the Court. The only inference to be drawn from the evidence as to the existence of the dirt and debris which caused Steed's accident is that it was not present two days before when the switching movement was safely made and that it was the result of the tracks being immersed in water the day before, a condition noted by Riegel's safety director, and the vehicular traffic which traversed the area thereafter. Central cannot be charged with "acquiescence" in the existence of the condition which caused the derailment.

As set worth in the finding of facts 2(d) there is no evidence that prior to the derailment any member of the train crew other than Steed saw or was in a position to see the accumulation of dirt and debris which caused the accident. Riegel argues that the conductor, McLendon, should have examined the entire CFP track before permitting cars to be switched into that track. Each member of the train crew was an invitee on Riegel's premises and under no duty to assume negligence on the part of Riegel in maintaining the track. If, in fact, McLendon had walked down the track prior to the derailment he could have ben charged with actual or imputed knowledge of the condition and the case would then be within the ambit of *Colonial Stores, Inc. v. Central of Georgia*, 279 F.2d 777 (5th Cir. 1960). In applying the same indemnity provision as in this case, the Court there limited the railroad's recovery to 50 per cent in view of proof that the conductor walked the length of a platform a few minutes prior to the accident in which an employee of the railroad fell due to an accumulation of foreign substances on the platform. Under that proof, knowledge of the presence of the condition was imputed to the engineer.

There is no such evidence in this case and there is no proof that any member of the crew, in carrying out the switching movement, should have positioned himself other than where the testimony showed him to be. Finding of Fact 2(d) is depositive of Riegel's contention directed to the conductor and Finding of Fact 2(f) is depositive of any contention regarding the movement of the cut of cars by the engineer.

Finally, Riegel contends that, there being proof of a derailment, the doctrine of res ipsa loquitur is applicable and its invocation requires the case to be submitted to the jury on whether the railroad has rebutted the presumption of negligence that it caused or contributed to the derailment. For that doctrine to apply, it is a requisite that the party against whom it is invoked have full management and control of the instrumentality which caused the injury. See *Alabama Power Co. v. Berry*, 254 Ala. 228, 48 So.2d 231 (1950). Central did not have management and control of the track, its maintenance being without dispute the duty of Riegel. The issue of res ipsa loquitur, in this Court's judgment, is not well taken.

The Court is therefore of the opinion that there is no evidence which would authorize a reduction in Central's recovery to 50 per cent of its loss.

There remains for decision the question of Central's right to recover the medical expenses which it paid for Steed's treatment, hospital and nursing care. Neither party has furnished the Court with direct authority on this point. Riegel has stipulated that one of the reasons Central paid these expenses was in mitigation of damages. This Central was under a legal duty to do. Central argues that, in addition to mitigation, the payments were made in recognition of a probable liability which was ultimately proven. Therefore, so Central contends, the payments should be viewed in the same light as a voluntary settlement which in a common law action can be recovered

from the indemnitor if the indemnitee can show a liability to the third party with whom the settlement was made. In the Court's opinion, the medical expenses are recoverable.

Judgment will be entered for the plaintiff for $394,421.32 plus interest from May 13, 1971 to the date of the judgment and its costs.

This the 16th day of July, 1974.

/s/ FRANK H. McFADDEN
Chief Judge

APPENDIX "C"

J. P. STEED, Plaintiff,

v.

CENTRAL OF GEORGIA RAILWAY COMPANY,
Defendant-Third Party Plaintiff-Appellee,

v.

RIEGEL TEXTILE CORPORATION,
Third Party Defendant-Appellant.

No. 72-2609

United States Court of Appeals
Fifth Circuit

May 1, 1973

Railroad brought action against tenant under written track agreement for indemnification for recovery obtained by railroad employee against railroad for injuries sustained while switching railroad cars to tenant's plant. The United States District Court for the Northern District of Alabama, Frank H. McFadden, Chief Judge, rendered summary judgment in favor of the railroad and the tenant appealed. The Court of Appeals, Rives, Circuit Judge, held that questions of fact existed concerning construction and application of indemnity, provisions of track agreement, parties' negligence, whether negligence was sole, joint or concurring and proximate causation, thus precluding summary judgment.

Reversed and remanded.

1. Courts key 406.5(3)

On appeal from summary judgment, record must be viewed in light most favorable to party opposing motion for summary judgment. Fed.RulesCiv.Proc., rules 52(a), 56(c), 28 U.S.C.A.

2. Federal Civil Procedure key 2544

Party moving for summary judgment bears burden of showing both that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. Fed. RulesCiv.Proc., rules 52(a), 56(c), 28 U.S.C.A.

3. Federal Civil Procedure key 2492

In railroad's third-party action against tenant under written track agreement for indemnification for recovery obtained against railroad by railroad employee for injuries sustained while switching railroad cars to tenant's plant, questions of fact existed concerning construction and application of indemnity provisions of track agreement, negligence of parties, proximate causation and whether negligence was sole, joint or concurring, thus precluding summary judgment. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.; Fed.Rules Civ. Proc. rules 52(a), 56(c), 28 U.S.C.A.

James E. Clark, Birmingham, Ala., for appellant.

Will Sadler, Jr., W. J. Sullivan, Birmingham, Ala., for appellee.

Before RIVES, GOLDBERG and MORGAN, Circuit Judges.

RIVES, Circuit Judge:

In this diversity case, Riegel Textile Corporation appeals from a summary judgment granted against it for $403,105.60 on the motion of Central of Georgia Railway Company. We reverse.

The claim arises out of an accident that occurred on December 30, 1966, when J. P. Steed, a trainman-employee of Central, was injured while switching railroad cars for Central to the plant of Riegel in Trion, Georgia. A moving car, on which Steed was riding, derailed causing Steed's legs to be pinned between the side of the car and the loading platform on Riegel's premises. One of Steed's legs was traumatically amputated approximately 3½ inches below the knee and the other was severely injured.

On March 1, 1967, Steed filed a Federal Employers' Liability Act suit against the Central of Georgia in the Circuit Court of Jefferson County, Alabama. On December 9, 1968, Central filed a third-party complaint in that case against Riegel seeking indemnification from Riegel in the event of a recovery by Steed against Central. The third-party complaint is based upon a written track agreement dated April 24, 1948, which was in effect between Riegel and Central at the time of the accident. The specific language in the agreement made the basis of the third-party claim reads as follows:

> "The Tenant (Riegel) also agrees to indemnify and hold harmless the Railway (Central of Georgia) from loss, damage, or injury from any act or omission of the Tenant, its employees or agents, to the person or property of the parties hereto and their employees and the person or property of any other person or corporation, while on or about said track; and if any claim or liability other than from fire shall arise from the joint or concurring negligence of the parties hereto, it shall be borne by them equally."

Two other provisions of the track agreement pertinent to the case read as follows:

> "2. The Tenant (Riegel) will pay for, own and maintain the entire track from the point of the switch to the end of the track, or about 720 feet in length, as shown in green on said print.
>
> * * * * * * *

> "4. If the Tenant fails to maintain said track in safe operating condition, as prescribed by the railway, the Tenant agrees that the railway may put it in repair at the Tenant's expense or may discontinue operating thereover."

On May 1, 1969, Riegel filed a petition for the removal of the entire case to the federal court. On May 2, 1969, the district court, on motion to remand, entered an order remanding the original complaint (Steed v. Central) to the state court, but retaining jurisdiction over this third-party complaint. That action of the district court was affirmed by the Fifth Circuit in Central of Georgia Railway Co. v. Riegel Textile Corp., 1970, 426 F.2d 935.

The trial of the FELA case in the state court occurred in June, 1969, resulting in a judgment in favor of Steed and against Central in the amount of $500,000. On November 21, 1969, the state trial judge entered a remittitur reducing the judgment to $300,000, and otherwise overruled Central's motion for a new trial. The remittitur was accepted by Steed. On April 8, 1971, the Alabama Supreme Court affirmed in Central of Georgia v. Steed, 287 Ala. 64, 248 So.2d 110.

The third-party complaint against Riegel had been held in abeyance pending the final disposition of the primary case (Steed v. Central) in the state courts. The amount of Steed's recovery from Central having been finally established in the state courts, the issue in the district court on the third-party complaint was whether Riegel should reimburse Central as to all, or one-half, or none of Central's total outlay in the case. The parties stipulated that the matter of Riegel's liability must be determined in accordance with the above-quoted provisions of the track agreement and with the laws of the State of Georgia where the accident occurred.

The parties further stipulated that, by certified mail on March 23, 1967, Central made a demand on Riegel based on the terms

of the 1948 track agreement. However, Riegel contended that there was an obligation upon Central to promptly notify Riegel, as indemnitor, that an accident had occurred and that Central faced a loss which it expected Riegel to defend and indemnify. Riegel further contended that such notice and demand was not made by Central within a reasonable time after the filing of Steed's complaint against Central. Central, however, took the position that regardless of when demand was made upon Riegel as indemnitor, Riegel had actual notice of the accident since it occurred on its premises. Riegel, nonetheless, claimed the right to contest the reasonableness of Central's actions, and whether Central reasonably took steps to settle the case prior to suit being filed by Steed and demand being made by Central upon Riegel.

Central took the position that since it gave Riegel notice of the filing of Steed's lawsuit and gave it an opportunity to defend, while Riegel refused, the final judgment in Steed's case is conclusive against Riegel to the effect that Steed was not furnished a safe place to work. On the other hand, Riegel contended that the judgment against Central in the state court is a prima facie showing that Central was negligent, and that there was at least joint and concurring negligence by Central and Riegel.

It was stipulated that either party may introduce into evidence any portion of the testimony of the witnesses or other evidence introduced at the trial of the case of Steed v. Central in the state court, and that either party may use or call as a witness any party who testified at the previous trial in the state court in lieu of, or in addition to, his testimony at said trial. In addition, extensive depositions were taken both by Central and by Riegel in this third-party action.

Central moved for summary judgment based on the record in the case of Steed v. Central of Georgia Railway Co., Case No. 16281, in the Circuit Court for the Tenth Judicial Circuit of Alabama, including the record on appeal therein and the opin-

ion of the Supreme Court of Alabama, the pleadings and admissions, and all depositions taken in the case. Unfortunately, the district court provided no key as to the facts which it considered important, nor did it elucidate its rationale for granting Central summary judgment against Riegel for full indemnity. Rule 52 (a), F.R.Civ.P., provides that findings of fact and conclusions of law are unnecessary on decisions of motions for summary judgment. Nonetheless, as Judge Hutcheson commented in United States for Use of Industrial Instrument Corp. v. Paul Hardeman, Inc., 5th Cir. 1963, 320 F.2d 115, 116:

> "* * * they are certainly permissible and the practice has been commended as greatly helpful to the appellate court in making clear the basis for the trial court's decision. 3 Barron & Holtzoff, Federal Practice and Procedure, Sec. 1242 at 201 (Wright ed. 1958)."

[1, 2] On appeal from a summary judgment, the record must be viewed in the light most favorable to the party opposing the motion.[1] The moving party bears the burden of showing both that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[2]

[3] This Court is not now called on to discuss and decide the many complex and difficult questions of fact and law remaining to be settled in this third-party action—such, for example, as the construction and application of the indemnity agreement;

---

[1] Poller v. Columbia Broadcasting System, 1962, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458; Pogue v. Great A&P Tea Co., 5th Cir. 1957, 242 F.2d 575, 576; 3 Barron & Holtzoff (Wright Rules ed.) §1242, p. 198 n. 46.

[2] Rule 56(c), F.R.Civ.P.; Palmer v. Chamberlin, 5th Cir. 1951, 191 F.2d 532, 540.

whether, as between Central and Riegel, the negligence of either has been conclusively established; if so, whether such negligence was sole, joint, or concurring; questions of proximate causation; and many other questions. Central simply has not met the heavy burden resting on it, as the party moving for summary judgment, to show as a matter of law that Riegel should reimburse Central for all, for one-half, or for any part of Central's total outlay in the case. This Court makes no determination or intimation as to any of the questions. The judgment is reversed and the case is remanded for a trial on its merits.

Reversed and remanded.

APPENDIX "D"

287 Alabama Reports 64
248 So.2d 110

CENTRAL OF GEORGIA RAILWAY COMPANY, a corporation

v.

J. P. STEED.

6 Div. 774.

Supreme Court of Alabama.

April 8, 1971.

Rehearing Denied May 6, 1971.

Action by railroad employee against railroad under provisions of Federal Employers' Liability Act. The Circuit Court, Jefferson County, Whit Windham, J., gave judgment for employee, and railroad appealed. The Supreme Court, Maddox, J., held that in view of fact that there was evidence of a derailment which caused injury to railroad employee, and since trial judge substantially covered in oral charge the question of burden of proof on employee and the question of contributory negligence in a case brought under Federal Employer's Liability Act, it was not error to refuse requested charge stating, inter alia, that no presumption of negligence on part of railroad arose from mere fact that employee was injured, and that employee had burden of proving that railroad was guilty of negligence which proximately caused injury and damage.

Affirmed.

Coleman, J., dissented.

1. Appeal and Error Key 932(1)

Order by trial court to plaintiff to file a remittitur in a certain sum or to try the case again gives rise to a favorable presumption as to correctness of amount of judgment in the sum finally awarded.

2. Damages Key 228

New Trial Key 76(1)

only when verdict or amount has been adduced or reached on account of bias, passion, prejudice, corruption or other improper motive or cause does court have authority to set verdict aside or order a remittitur, and a court is without authority to interfere with verdict on ground that in court's opinion the jury gave too much.

3. Damages Key 132(9)

Supreme Court would not order a further reduction of damages, which were remitted from $500,000 to $300,000, in relation to railroad worker who lost leg below knee in accident, or order a new trial on ground that amount finally awarded was so excessive as to indicate bias, passion, prejudice or other improper motive.

4. Trial Key 304, 305

Refusal to grant mistrial, on grounds that, inter alia, mother of a juror died, a juror became ill and had to be hospitalized, and husband of a juror made a statement to representative of defendant, which was apparently not communicated to juror herself, that defendant railroad should settle the case in that it had plenty of money, was not an abuse of discretion where trial judge determined from juror herself that despite death of her

mother she was able to participate in the trial as a juror, and where judge thoroughly investigated alleged statement made by husband and after such investigation determined that no prejudice existed. Code of Ala., Tit. 30, § 100.

5. Appeal and Error Key 1170(7)

Evidence Key 262

Refusal to allow introduction into evidence, in action by injured employee against railroad, of copy of complaint filed by employee in another state against two other corporations, even if such were considered error, did not probably injuriously affect substantial rights of railroad where jury was instructed on two separate occasions to effect that an individual could file several suits but could have but one satisfaction, and where, further, it did not appear that a proper predicate was laid for introduction of pleadings in the other case since record failed to show sufficiently that the pleadings were drawn under employee's direction or with his assent. Supreme Court Rules, rule 45.

6. Negligence Key 140

Refusal to charge that if jury, after considering all the evidence, was doubtful or uncertain as to whether or not any claim of injury to plaintiff was a direct proximate consequence of a negligent act of the defendant, then jury would have to resolve that doubt in favor of defendant was not error.

7. Negligence Key 140

The "unavoidable accident" charge has a tendency to confuse and mislead the jury and the better practice is to refuse such charge.

8. Trial Key 260(1)

Refusal to give requested charge was not error where the matter was adequately covered in court's oral charge. Supreme Court Rules, rule 45.

9. Trial Key 260(8)

In view of fact that there was evidence of a derailment which caused injury to railroad employee, and since trial judge substantially covered in oral charge the question of burden of proof on employee and the question of contributory negligence in a case brought under Federal Employers' Liability Act it was not error to refuse requested charge stating, inter alia, that no presumption of negligence on part of railroad arose from mere fact that employee was injured, and that employee had burden of proving that railroad was guilty of negligence which proximately caused injury and damage. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

10. Jury Key 131(5)

Trial court's action in qualifying the jury as to whether any members of the jury were employees of or had any financial interest in alleged insurance carriers of two corporations, which were defendants in suit brought in another state by plaintiff railroad employee, who was injured in derailment, was not an abuse of discretion in suit against railroad where subject of insurance coverage was injected by the railroad.

11. Evidence Key 382

When portions of a document are admissible the whole document may be admitted without error even though some parts of the document may be inadmissible and prejudicial.

12. Master and Servant Key 270(10)

Portions of agreement between defendant railroad and corporation relating to construction of track and operation and maintenance of railroad acitvities in vicinity of corporation's plant, which spelled out duties of railroad and plant with regard to spur track, were admissible in action by railroad employee against railroad arising out of derailment on issue of responsibility of railroad to provide employee with a safe place to work.

13. Evidence Key 359(2)

Admission in evidence, in action by railroad employee against railroad for injuries sustained in derailment, of photographs of employee which were taken while he was in traction in the hospital was not error.

On Rehearing

14. Costs key 260(5)

Statutory 10% penalty was properly imposed in action under Federal Employers' Liability Act where judgment for plaintiff was affirmed on appeal. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51; Code of Ala., Tit. 7, § 814.

Sadler, Sadler, Sullivan & Sharp, Birmingham, for appellant.

When a verdict is rendered in such an excessive amount as to indicate that it is the result of bias, passion, prejudice or other improper motive on the part of the jury, then the verdict is due to be set aside and a new trial granted, unless an adequate remittitur is entered by the court. Yarbrough v. Mallory, 225 Ala.

579, 144 So. 447; Alabama Gas Co. v. Jones, 244 Ala. 413, 13 So.2d 873. A judgment in the amount of $300,000.00 to a plaintiff who has lost that portion of his leg below his knee and who has had injury to the other leg, but with good recovery for normal use, is grossly and unconscionably excessive. Russell v. Monongahela R. R. Co., 159 F.Supp. 650, Affirmed 262 F.2d 349; Moore v. Ready Mix Concrete Co., 329 S.W.2d 14; Butler v. General Motors Corp., 143 F.Supp. 461, Affirmed 240 F.2d 82. A pleading in another action is admissible against the party in whose behalf it was filed, where it is authenticated by his signature or that of his authorized agent or attorney; or where it is verified by the party's oath, although he testifies that he signed and swore to the pleading without reading it; or where the statements contained therein are of such a nature that information with respect to the facts set forth could have come to the attorney only from the client; or the records show that the pleader's agent, when drafting the pleading, had access to original sources of information. 31-A Corpus Juris Secundum 781; Birmingham Elect. Co. v. Wood, 222 Ala. 103, 130 So. 786; Cole v. L. & N. R. R. Co., 267 Ala. 196, 100 So.2d 684. A track agreement between a railroad and an industry is not admissible in evidence in favor of an injured employee of the railroad who has sued for injuries sustained inasmuch as the railroad owes the employee the duty to maintain the tracks in reasonably safe condition. Baltimore & O. R. Co. v. Redheavor, 139 Md. 632, 81 A.2d 63. It is improper for the plaintiff to introduce in evidence a photograph of himself, in traction, in the hospital, when there is no dispute as to his injuries, and when the photograph is calculated purely and simply to inflame the jury and to create undue sympathy in favor of the plaintiff and against the defendant. Bagley v. Grimes, 283 Ala. 668, 220 So.2d 876.

Rives, Peterson, Pettus, Conway & Burge, Birmingham, for appellee.

Remittiturs are favored for promotion of justice and the end of litigation, and where trial judge has ordered remittitur and overruled motion for new trial, presumption of correctness is indulged on appeal where trial judge has observed witnesses and incidents which cannot be reflected in transcript. Airheart v. Green, 267 Ala. 89, 104 So.2d 687. Where verdict includes damages not measurable by yardstick, favorable presumption attends result in Court below, and Supreme Court is reluctant to pronounce its judgment, based only on the printed page, to be so superior to that of the jury and trial judge as to substitute its judgment for theirs. Stringfellow v. Rambo, 277 Ala. 349, 170 So.2d 494. Pleadings in other cases signed and filed by counsel are not admissible against the party unless shown to have been drawn by his express direction and statements of fact therein inserted by his direction or with his assent. Graves v. Cruse-Crawford Mfg. Co., 203 Ala. 202, 80 So.2d 452; B'ham Electric Co. v. Wood, 222 Ala. 103, 130 So. 786; Cole v. L. & N. R. Co., 267 Ala. 196, 100 So.2d 684. Error to reverse may not be predicated on refusal of an "unavoidable accident" charge. Socier v. Woodard, 264 Ala. 514, 88 So.2d 783 Annotation, 65 A.L.R.2d 12, 29. Spur track agreement requiring industry to keep track safe for employees of railroad, but reserving right of railroad to enter and make corrections, is material on issue of whether defendant in F.E.L.A. case exercised required care with respect to spur track. Ruddy v. New York Central R. Co., 224 F.2d 96; Id. 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 779. Where a contract is deemed material and relevant to any issue, it is not to be excluded because it may tend to show defendant has an indemnitor. Moore Handley Hdw. Co. v. Williams, 238 Ala. 189, 189 So. 757.

MADDOX, Justice.

Appellee, J. P. Steed, brought suit against the Central of Georgia Railroad under the provisions of the Federal Employ-

ers' Liability Act, Title 45, § 51 U.S.C., in the Circuit Court of Jefferson County, Alabama on March 3, 1967.

Plaintiff (Appellee) alleged that he sustained injuries as a result of the negligence of the officers, agents or employees of the defendant while acting within the line and scope of their employment by the defendant, or by reason of a defect or insufficiency due to the negligence of the defendant in its cars, engines, appliances, machinery, tracks, roadbed, works or other equipment. In count two he alleged that the defendant negligently failed to exercise reasonable care to furnish or maintain him a reasonably safe place to perform his work.

Prior to the trial of the case, Central of Georgia filed a third party complaint against Riegel Textile Corporation. Riegel removed the case to the U. S. District Court. The issues between the Central of Georgia and Riegel were severed from the main case and the trial was between Steed and Central of Georgia.

The track where the accident occurred was built, maintained, and used in accordance with a track agreement between Riegel and Central of Georgia which provided in part that Riegel would own and maintain the spur track (or if it failed to maintain the track then it was agreed that the railroad would do it), and that Riegel would indemnify Central of Georgia from loss or damage from any act of the tenant, its employees or agents, while others were on or about the track.

This spur track was situated in part of a roadway in the Riegel plant. At about the time of the accident, a boiler was being constructed across the road from the loading platform. Gravel and debris would get on the tracks from trucks traveling along the roadway.

The alleged negligence occurred on December 30, 1966. Steed was called to fill the regular job of an absent employee whose job included working for the railroad at the Riegel plant

that day. Steed had worked with the railroad at the Riegel plant before. He was directing the switching of cars at the Riegel plant by radio. The cars were moving at a speed of about 2-3 miles per hour and Steed was directing the engineer by radio as to how close he was to the rear of the car to be coupled. Steed was standing on the side ladder of the lead car moving toward the loading platform and was between the car and the platform when the derailment occurred. Steed was caught between the car and the platform and dragged 40-50 feet after being caught. The left leg was almost amputated save for a piece of skin and the right leg was badly fractured and torn.

As to the circumstances surrounding the accident, Steed testified that the track looked no different at the time of the derailment than it had on other occasions when he was there. He testified that he was riding on the lead car, approaching another car, and looking at the car ahead, when he heard the sound of rocks grinding and looked down and saw the wheels off the track. He then said that he tried to jump to the platform but was caught between it and the car. A railroad employee testified that there had been four or five derailments on the spur track to the Riegel plant prior to time of the derailment made the basis of this suit. Steed denied knowledge of any previous derailments on the spur track.

Steed was taken to a Trion, Georgia hospital where his left leg was removed below the knee. He was later taken to Baroness Erlanger Hospital in Chattanooga, Tennessee. Steed was in the hospital in Chattanooga some eighty days during which time he underwent two operations. Pins were placed in the right leg and he was placed in traction for seventy-three days. He was encased in a body cast and kept lying down for approximately three months. He was in and out of the hospital and home in bed for various periods of time through January 23, 1968. He progressed from a wheel chair to a walker. At the time of trial, Steed maintained that he was uncomfortable in his artificial

limb and that the stump swelled and drained and that his right leg was stiff and that he did not have full use of it.

When working, Steed made about $700 per month. If he had kept working, his seniority would soon earn him about $1100 per month. There is some testimony that he had suffered great mental anguish and a psychiatrist testified that Steed had become psychoneurotic as a result of the injury and further stated that future psychiatric care might be indicated.

The jury returned a verdict for the plaintiff in the amount of $500,000. On motion for a new trial, the plaintiff accepted a remittitur of $200,000, and the Court denied the defendant's motion for a new trial.

Central of Georgia argues primarily here that the verdict of the jury is so excessive in amount as to shock the conscience of the court, and that the verdict was obviously rendered by the jury as a result of bias, prejudice, or other improper motives, and that the remittitur ordered by the Court and consented to by the plaintiff, did not eradicate the alleged bias, prejudice or other improper motive. Succinctly stated, the railroad's argument of bias and prejudice is based upon the following premises:

1. The case was recessed for four days because of the death of a juror's mother.

2. The case was recessed for an additional week because of the illness of one of the jurors.

3. The jury deliberated for only forty-five minutes and returned a verdict for $500,000.

4. The trial court's reduction of the verdict by 40% indicates that bias and prejudice existed.

5. The judgment of $300,000 will give the plaintiff an income of $15,000-$18,000 annually for life and permit him to leave an estate of $300,000.

No inflexible rule exists to guide a court in determining whether bias, prejudice or other improper motive is indicated because of the amount of a particular jury verdict. This court has said that the internal evidence, the verdict itself, in the light of the facts clearly disclosed by the evidence, usually furnishes the determining data. Alabama Gas Co. v. Jones, 244 Ala. 413, 13 So.2d 873 (1943).

[1] On motion for a new trial the court ordered the plaintiff to file a remittitur of $200,000 or be required to try the cause again. On several previous occasions this court has determined that such action by the trial court gives rise to a favorable presumption as to the correctness of the amount of the judgment in the sum finally awarded. Airheart v. Green, 267 Ala. 689, 104 So.2d 687 (1958); Hercules Inc. v. Jones, 284 Ala. 692, 228 So.2d 9 (1969); Carlisle v. Miller, 275 Ala. 440, 155 So.2d 689 (1963).

In Airheart v. Green, supra, the Court said:

> "The action of the trial court in conditioning the granting of a new trial to the defendant upon the filing of a remittitur by the plaintiff is also urged as error. Courts do not favor the setting aside of verdicts if it can be justly avoided. ' "Remittiturs," * * * "are favored * * * in proper cases, for the promotion of justice and the ending of litigation." ' Cook & Laurie Contracting Co. v. Bell, 177 Ala. 618, 635, 59 So. 273, 279. Where it is found that the jury's verdict is so excessive as to indicate that it resulted from passion, prejudice, or other improper motive, this court, recognizing and applying the above principle has ordered a new trial conditioned, however, upon the failure of the appellee to file a remittitur of a specified amount of damages. Waters v. Anthony, 256 Ala. 370, 54 So.2d 589; Brasfield v. Hood, 221 Ala. 240, 128 So. 433; Southern Ry. Co. v. Dickson, 211 Ala. 481, 100 So. 665; Alabama Gas Co. v. Jones, 244 Ala. 413,

13 So.2d 873. See also Montgomery Traction Co. v. Knabe, 158 Ala. 458, 48 So. 501 (action of trial court in reducing the verdict; affirmed); Atlantic Coast Line R. R. Co. v. Barnes, 261 Ala. 496, 75 So.2d 91 (remittitur order by trial court; affirmed).

"Likewise, where as here, the trial court has ordered a remittitur of a specified amount and has refused to grant a new trial, a favorable presumption as to the correctness thereof is indulged by this court. Birmingham Electric Co. v. Thompson, 251 Ala. 465, 37 So.2d 633. And whether this court should further reduce the verdict or set the verdict aside involves a review of trial court's judgment based upon his observation of all the witnesses who testified in the case and other incidents of the trial which cannot be reflected in the transcript and which are not available for observation by us. Luquire Funeral Home[s] Ins. Co. v. Turner, 235 Ala. 305, 178 So. 536; Birmingham Elec. Co. v. Howard, 250 Ala. 421, 34 So.2d 830; Moore v. Cooke, 264 Ala. 97, 84 So.2d 748."

[2] No standard exists for the admeasurement of damages for pain and suffering, and the weight to be given evidence of pain and suffering is discretionary with the jury. Only when the verdict or the amount has been induced or reached on account of bias, passion, prejudice, corruption or other improper motive or cause does the court have authority to set the verdict aside or order a remittitur. The court is without authority to interfere with the verdict on the ground that in the opinion of the court the jury gave too much. Airheart v. Green, supra, and cases there cited. Stringfellow v. Rambo, 277 Ala. 349, 170 So.2d 494 (1965).

[3] We have carefully studied the entire record, taking into consideration the guiding principles set out in Airheart v. Green, supra, and being mindful that we must exercise our authority to

disturb a jury verdict with great caution, we decline to order a further reduction or to order a new trial on the ground that the amount finally awarded is so excessive as to indicate bias, passion, prejudice or other improper motive.

Appellant railroad also claims that the trial court erred in not granting defendant's motion for a mistrial based on the cumulative effect of the following events which occurred during the course of the trial:

1. The mother of a juror died.

2. A juror became ill and had to be hospitalized.

3. The juror who became ill was required to continue service on the jury while still technically a patient at the hospital.

4. The husband of a juror at the courthouse where the case was tried made a statement to representatives of the defendant but which apparently was not communicated to the juror herself that the defendant should settle the case, that it had plenty of money.

The applicable statute is § 100 of Title 30, Code of Alabama, 1940 (Recomp. 1958):

"The courts or presiding judges in all cases of jury trial may discharge the jury without giving a verdict, with the consent of all parties to the trial, or without the consent of the parties, when in the opinion of the court or judge there is manifest necessity for the discharge, or when the ends of justice would otherwise be defeated. In all cases, in which the jury is discharged, without a verdict, a mistrial shall be entered upon the minutes of the court, assigning the reason or cause for the mistrial; and no person shall gain any advantage by reason of such discharge of the jury."

[4] Unquestionably, the trial of this cause did not proceed without difficulty. The trial Judge was aware of this fact and

so stated in his order on the motion for a new trial. We have carefully examined the record, however, and fail to see that the trial Judge abused his discretion in refusing to grant a mistrial. The mother of the juror who died was quite elderly, was in a nursing home and had been ill for some time. The trial Judge determined not only from the doctor but from the juror herself that she was able to participate in the trial as a juror. The trial Judge investigated thoroughly the alleged statement made by the husband of one of the jurors and after such investigation determined no prejudice existed. Moreover, we think the principle announced by this court in Shadle v. State, 280 Ala. 379, 194 So.2d 538 (1967), is applicable here:

> "* * * Of course, it is well recognized that the granting of a mistrial is within the sound discretion of the trial court, for he, being present, is in a much better position to determine what effect, if any, some occurrence may have upon the jury's ability to decide the defendant's fate fairly and justly. And we will not interfere with the trial judge unless there had been a clear abuse of discretion. * * *"

Appellant's Assignment of Error No. 51 is as follows:

> "The Trial Court erred in sustaining the plaintiff's objection to the defendant's offer to introduce into evidence what has been identified as Defendant's Exhibit B, being an exemplified copy of the complaint filed by the plaintiff in the State of Georgia against Riegel Textile Corporation and McBerney Stoker and Equipment Company."

During the cross-examination of plaintiff Steed, railroad attorneys attempted to introduce into evidence pleadings in a case filed in the Superior Court of Fulton County, Georgia styled "J. P. Steed and Ruth Steed, plaintiffs, v. Riegel Textile Corporation and McBerney Stoker and Equipment Co., defendants."

The trial court refused to admit the pleadings, stating:

> "* * * [T]he wording of the complaint would not be material, the fact of the filing of the complaint having already been made a part of the evidence in the case."[1]

[5] The fact that Steed had filed a suit against Riegel and McBurney Stoker in Atlanta was obviously before the jury. Steed himself testified that he "guessed" a suit had been filed on his behalf in Georgia. The trial Judge instructed the jury on two separate occasions to the effect that an individual could file several suits but could have but one satisfaction. Therefore, it would appear that even if it were considered to be error to reject the evidence, such rejection did not probably injuriously affect the substantial rights of the railroad. Supreme Court Rule 45, 261 Ala. XXXVII. Furthermore, we are not entirely con-

---

[1] During opening statements to the jury both sides discussed the suit by Steed against Riegel and McBerney Stoker, the discussion finally terminating in a statement from the Court as follows:

> "THE COURT: I was thinking something that I was about to say. I know the jury is already mystified about one aspect of this lawsuit, with reference to other suits, and so forth.
>
> "They may be laboring under the impression that, for instance, if there were four or five automobiles out here in a crash, that you could sue the driver of each one of them if you got hurt in it.
>
> "Well, you could.
>
> "But, if you are mystified as to that, here, where this plaintiff is suing first one and then another, the law says that no litigant can ever have but one satisfaction of his claim.
>
> "If he doesn't take the money—he can sue various people, but he can't [sic] ever have but one satisfaction of the claim, whether it comes from this source, or the other source.
>
> "So, that is—another reason—the only reason I have for mentioning it is this:
>
> "What we are going to try, as best we can, if counsel will work with me on it, and I hope they will is to get our minds on this lawsuit and try it in fairness and in justice to both sides, and we can do this if we will put our minds on the business of trying this lawsuit on its merits, and on the law of the case, and on the testimony in the case, in trying this case and disposing of it.
>
> "I will give each side an exception to what I have said."

vinced that a proper predicate was laid for the introduction of the pleadings since the record fails to show sufficiently that the pleadings sought to be introduced were drawn under Steed's direction or with his assent.[2] In addition, the trial Judge, upon rejecting the admission of the pleading was careful to point out the previous statement he had made to the jury about the filing of other lawsuits in connection with the transaction made the basis of this cause; therefore, the jury had to be aware of the fact that Steed had filed the other actions.

In Maddox v. Ennis, 274 Ala. 229, 147 So.2d 788 (1962), this Court stated the "rule" of Cole v. L. & N. R. R., 267 Ala. 196, 100 So.2d 684, where McElroy's Law of Evidence was quoted as follows:

> "As a general proposition, pleadings that have been filed in behalf of a party in another cause or in the present cause, are admissible against him as admissions in the present cause if * * * it be first shown that they were drawn under his direction or with his assent. [Citing cases]" *Maddox*, supra, then goes on to state:

> "We note that Vol. II of the 'Law of Evidence in Alabama' (1962), by Judge McElroy, Sec. 181.01 p. 7 states:

> " 'It is clear that a party's document of pleading whether filed in the present action or another action is admissible against such party in the present action, as an admission of the truth of the facts stated in the pleading, if it is shown that such party swore to it, signed it, directed its drawing, or assented to it as a correct statement: [Citing cases.]' "

[2] "Q. (BY MR. SADLER:) Mr. Steed, on your behalf a suit has been been filed in the State of Georgia, has it not?

"A. I guess it has.

"Q. Against the Riegel Textile Corporation?

"A. I haven't [sic] never seen it, just——

"Q. (Interposing) You authorized your attorney to do that, did you not?

"A. No audible answer.

"MR. SADLER: I would like to introduce this exemplified copy of the complaint, if the Court please, and if we can have this marked as an exhibit."

We find no reversible error in the trial court's rejection of the pleadings filed by Steed in Georgia.

Appellant claims in Assignment of Error No. 19 that the trial court erred in refusing to give defendant's charge:

> "8. Ladies and gentlemen of the jury, I charge you that after considering all of the evidence in the case you are doubtful or uncertain as to whether or not any claim of injury to the plaintiff was a direct proximate consequence of a negligent act of the defendant, then you must resolve that doubt in favor of the defendant."

[6] The rejected charge is similar to charges condemned in Hill Grocery Co. v. Wilson, 265 Ala. 49, 89 So.2d 687 (1956), and Nelson v. Lee, 249 Ala. 549, 32 So.2d 22 (1947), and we find no error in refusing the charge.

Appellant's Assignment of Error No. 21 claims the trial court erred in refusing to give this charge:

> "11. Ladies and gentlemen of the jury, I charge you that if you are reasonably satisfied from the evidence in this case that the plaintiff sustained his injuries and damages as the proximate result of an unavoidable accident, and not as the direct proximate result of any negligence on the part of the defendant then you cannot find in favor of the plaintiff and against the defendant."

In the case of Socier v. Woodard, 264 Ala. 514, 88 So.2d 783 (1956), this court said:

"* * * [N]either the giving nor refusal of such a ['mere accident'] charge is reversible [error]. But the better practice is to refuse it."

[7] This court has also held that the "unavoidable accident" charge has a tendency to confuse and mislead and the better practice is to refuse such a charge. Taylor v. Thompson, 271 Ala. 18, 122 So.2d 277 (1960), and Riddle v. Dorough, 279 Ala. 527, 187 So.2d 568 (1966).

Appellant claims the trial court erred in refusing to give this charge (Assignment of Error No. 58):

"A. The court charges the jury that a verdict in this case will in no way affect the plaintiff's right of recovery in the Georgia litigation."

Appellant cites no authority to support this assignment but maintains there was confusion in the jury's mind about the other lawsuits and the charge should have been given.

[8] In any event, the matter was adequately covered in the court's oral charge as follows:

"The verdict for the plaintiff here, or for the plaintiff there, would not affect the other case. A verdict for the defendant here, or a verdict for the defendant over there, would not affect—neither one would affect the other, because it is a different entity that is sued, and they are really under a different law."

There was no error to refuse the charge. Supreme Court Rule 45.

Appellant railroad says that the trial court erred in refusing to give this charge:

"53. Ladies and gentlemen of the jury, I charge you that Mr. Steed was under a duty to keep a reasonable lookout for dangerous conditions on the track ahead of the

lead car of the train. If you are therefore reasonably satisfied from all of the evidence in the case that there were dangerous conditions on the track ahead of said lead car of said train which he could have discovered by the exercise of reasonable diligence, that he could have then avoided his accident and injuries had he discovered said conditions in time and that the defendant was not guilty of any negligence, which proximately contributed to his injuries and damages, then you cannot find in favor of the plaintiff and against the defendant."

The defense available in an F. E. L. A. action is that the employer was free from negligence proximately causing the injury. Contributory negligence of the plaintiff would not bar recovery but would merely mitigate damages. The trial court charged the jury in great detail on this point of law. The charge is somewhat confusing, and the trial court adequately covered the question of the plaintiff's alleged contributory negligence in his oral charge to the jury.

Assignment of Error No. 37 is to the effect that the trial court erred in refusing this charge:

"29. I charge you, ladies and gentlemen of the jury, that no presumption of negligence on the part of the defendant arises from the mere fact that the plaintiff was injured and damaged on the occasion complained of. The plaintiff has the burden of proving to your reasonable satisfaction from the evidence in the case that the defendant was guilty of negligence on the occasion complained of which proximately caused the injury and damage to the plaintiff, and if you are not so reasonably satisfied from the evidence in the case, then you cannot find for the plaintiff and against the defendant."

Of course, under Title 45 § 51 U.S.C. there is no presumption of negligence against the carrier arising upon mere proof of

injury to or death of an employee. Appellant recognizes that there is a *prima facie* presumption of negligence where there is a derailment, but claims that in instances where the cause of the derailment is explained by the evidence in the case then the presumption vanishes.

[9] The case of Ruddy v. New York Central R. R., 224 F.2d 96, cert. den., 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 779 (1955) stands for the proposition that under the *res ipsa loquitur* doctrine, negligence of the railroad causing injury could be inferred from the mere fact that the car was derailed on the spur track. In view of the fact that there was evidence of a derailment which caused the injury here, and since the trial Judge substantially covered the question of the burden of proof on the plaintiff and the question of contributory negligence in F. E. L. A. cases in his oral charge, there was no error in refusing the charge. Supreme Court Rule 45, 261 Ala. XXXVII.

Appellant claims that the trial court erred in qualifying the jury as to whether any members of the jury were employees of or had any financial interest in the alleged insurance carriers of Riegel Textile Co. and McBurney Stoker Equipment Corporation.

Appellant, in brief, says that the trial judge and the appellee fostered "an insidious plan to brainwash the jurors into believing that a recovery by the plaintiff would really not affect the railroad financially." We find nothing in the record to substantiate this statement made in brief and we are bound by the record.

We might point out that counsel for the railroad opened the controversy by stating to the prospective jurors that the railroad had no insurance. He then mentioned the suit in Georgia and that the suit was against McBurney and Riegel and asked the prospective jurors if they had ever worked for either

of these two companies. Plaintiff's counsel then asked the court to qualify the jury as to their interest in the insurance carriers for the two companies. Appellee maintains that the court cautiously exercised its discretion to examine the prospective jurors, and the record supports his position.

In Roan v. Smith, 272 Ala. 538, 133 So.2d 224 (1961), this Court stated:

> "The inquiries directed to prospective jurors as permitted under Tit. 30 § 52, Code of 1940, should be liberal and extend to any and all matters touching the qualifications, interest, or bias of prospective jurors. The extent of this examination of prospective jurors as to their qualifications is largely a matter resting within the sound discretion of the trial court. (Citations omitted.)
>
> "The attorney for the appellee stated to the court: 'The Roans own the Cadillac Finance Company.' This statement was not denied by the appellants. Under such circumstances, we think the trial court did not abuse its discretion in qualifying the jury as to any interest in the Cadillac Finance Company. Moreover, since no jurors answered the question in the affirmative, and not being struck as a result of such answer, it appears that even if the trial court was in error, it was error without injury."

[10] Since the subject of insurance coverage was injected by the railroad, and the jury was qualified as to any interest in the two companies in the Georgia suit, we do not think under the rule set forth in *Roan*, supra, that there was an abuse of discretion. We do not hold, however, that such qualifying questions would be proper in every case but under the facts of this case, we find no prejudicial error.

Assignments of Error No. 47 and No. 49 concern a track agreement between the railroad and Riegel Textile Corporation.

Defendant's counsel objected to the statement made by plaintiff's counsel in his opening address to the jury:

> "Now, we expect the evidence to show that there was a contract between Riegel Textile Corporation and the Central of Georgia Railway Company."

The agreement was later admitted into evidence over the objection of the railroad. The railroad maintains that the agreement was not material or relevant and was highly prejudicial, claiming that the plaintiff insinuated that the railroad was indifferent about the track since Riegel would have to bear expenses if damage or injury resulted.

Steed's attorneys say that the court was not apprised of any lack of materiality in the contract because appellant's objection was too general. The agreement was the first item of evidence sought to be introduced in the trial. The following occurred.

> "THE COURT: Who will you have, gentlemen?
>
> "MR. RUTLEDGE: Sir, we are ready with plaintiff's Exhibit Number 1. I want to offer into evidence, at this time, the contract between the Central of Georgia Railway Company and Riegel Textile Corporation, dated 24 August, 1948, which has been produced by the defendant in response to a motion to produce, which is the agreement covering the construction of the track and the operation, and the maintenance of the railroad activities in the Riegel Textile Corporation plant, which I would like to read to the jury, Your Honor.
>
> "THE COURT: Let counsel see it.
>
> "MR. RUTLEDGE: He gave it to me.
>
> "MR. SADLER: I object to it. We think that the contract is not relevant to the issues in this case.

> "It in no way increases or diminishes the duty that we might owe the plaintiff.
>
> "The duty, which we recognize, and whatever contract we might have with somebody else would be irrelevant and immaterial to the issues directed to us, and which is charged here, with respect to the maintenance of the track aspects of the contract within the financial arrangement.
>
> "THE COURT: I will overrule.
>
> "MR. SADLER: We except."

Appellant cites the case of Baltimore & O. R. R. v. Rodeheaver, 197 Md. 632, 81 A.2d 63 (1951) to support its argument that the agreement was inadmissible.

In *Rodeheaver*, supra, it was the railroad there which offered the indemnity agreement for the purpose of showing that the State Roads Commission agreed to hold the railroad harmless from all costs, etc., for injury to persons growing out of the erection, maintenance or operation of a bridge. The appellate court held that the lower court properly sustained objection to the document, since the case was not concerned in any way with whether the commission should indemnify the railroad.

At least one other jurisdiction has held that such agreements are admissible if any part of it relates to the duties of the parties thereto respecting clearances or dangerous obstructions, or otherwise bears upon the present controversy. Truitt v. Southern Pacific Co., 112 Cal.App.2d 218, 245 P.2d 1083 (1952).

[11, 12] Appellant's main argument is directed at the paragraph of the agreement which provided that Riegel would indemnify Central of Georgia against damages on account of the spur track. As is readily apparent, the objection made by appellant's counsel does not specifically point out to the court the indemnification paragraph of the agreement as being the objectionable portion. The court was not requested to delete

or exclude the indemnification paragraph from the remainder of the agreement. In view of this, even assuming without deciding that the indemnification paragraph may have been inadmissible, the court should not be put in error when no specific objection is made. We think that the portions of the agreement which spelled out the duties of the railroad and Riegel with regard to the spur track were clearly admissible on the issue of the responsibility of the railroad to provide the plaintiff with a safe place to work. This court has previously held that when portions of a document are admissible, the whole document may be admitted without error even though some parts of the document may be inadmissible and prejudicial. Moore-Handley Hardware Co. v. Williams, 238 Ala. 189, 189 So. 757 (1939). We find no error in admitting the agreement under the facts and circumstances of this particular case.

[13] Appellant claims that the trial court erred in overruling its objection to the introduction in evidence of a photograph of the plaintiff while he was in traction in the hospital. Appellant's attorneys argue that the only possible purpose of the photograph was to inflame the jury and in support of their argument cite Bagley v. Grime, 283 Ala. 688, 220 So.2d 876 (1969). We have examined the photograph introduced in this case and find that it is not of the inflammatory character as the one sought to be introduced in *Bagley*. Furthermore, in *Bagley* the trial court had refused to permit the introduction of a photograph of a "crumpled body" taken at the scene and this court held that the court acted properly in excluding the photograph in that case. This Court there said:

> "In view of the fact that this action was not against the railroad wherein the photographs might have shed light on the force of the impact, but was against the personal representative of Grime, whose wanton conduct was the issue, we hold that no error resulted from the exclusion

> of the photographs, since they shed no light on the question of Grime's wantonness."

We hold that the trial court committed no error in allowing the photographs of the plaintiff which were taken while he was in traction in the hospital.

We have carefully considered appellant's other assignments of error which were argued in brief and find no error was committed by the court.

The judgment of the trial court is due to be affirmed.

Affirmed.

HEFLIN, C. J., and LAWSON, SIMPSON, MERRILL, HARWOOD, BLOODWORTH and McCALL, JJ., concur.

COLEMAN, J., dissents.

ON REHEARING

On application for rehearing, Central of Georgia raises but one new issue, the assessment against it of the ten per cent penalty required to be assessed under the provisions of Title 7, § 814, Code of Alabama, 1940 (Recompiled, 1958). Central of Georgia assigns several grounds in its motion asking this court to "expunge, delete or remove the ten per cent penalty, amounting to $30,000, which has been assessed against the appellant." Stated succinctly, the grounds are (1) that the assessment is discriminatory and denies it equal protection of the law under the fourteenth amendment to the Federal Constitution; (2) that Title 7, § 814 is repugnant to the Alabama Constitution in that it penalizes an unsuccessful defendant-appellant, but does not penalize an unsuccessful plaintiff-appellant; (3) that Alabama cannot assess a penalty in a Federal Employers'

Liability Act case wherein the cause of action arose outside the State of Alabama; (4) that Alabama's assessment of the penalty is different from other states, creating an inconsistent and unfair application of the FELA law among the courts of the several states; (5) that the assessment is illegal and (6) that Title 7, § 814 is unconstitutional.

[14] This Court has previously decided that the ten per cent penalty imposed by Title 7, § 814 is appropriate. In Atlanta, Birmingham & Coast R. Co. v. Cary, 250 Ala. 675, 35 So.2d 559 (1948), we had the exact question before us involving an appeal in an action under FELA. We said:

> "Following the rendition of this opinion, the motion to amend the judgment of affirmance here entered presents the only matter here for consideration. This motion relates to the insistence of counsel for appellant that in the affirmance of this judgment the ten per cent penalty should not be imposed. Such a penalty is prescribed under the procedure of this State by Title 7, § 814, Code 1940, Snellings v. Builders' Supply Co., 229 Ala. 1, 155 So. 858.
>
> "We are cited to Ellis v. Union Pacific Railroad Co., 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572, and Bailey v. Central Vermont Railroad Co., 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444, which we consider here inapplicable.
>
> "As we view the matter this question was settled by the Supreme Court of the United States as far back as 1916 in Louisville & Nashville R.R. Co. v. Stewart, 241 U.S. 261, 36 S.Ct. 586, 60 L.Ed. 989, and is conclusive in denial of the motion.
>
> "The judgment as heretofore affirmed must stand and the motion be denied."

The application for rehearing is denied and the motion to expunge the ten per cent penalty prescribed by Title 7, § 814, is denied.

Opinion extended. Application for rehearing overruled. Motion to expunge 10% penalty denied.

HEFLIN, C. J., and LAWSON, SIMPSON, MERRILL, HARWOOD, BLOODWORTH and McCALL, JJ., concur.

COLEMAN, Justice.

On original deliverance I was of opinion that the judgment for plaintiff should be reversed and a new trial granted to defendant. I am of the same opinion still and do not reach the question treated in the opinion of the court on rehearing.

APPENDIX "E"

Selected Excerpts From the Transcript of the Evidence in Steed v. Central of Georgia v. Riegel, 529 F.2d 833, as Abstracted From the Deferred Appendix Therein, Showing the Source Thereof and for the Court's Comparison With the District Judge's Summary of Evidence Approved, Adopted and Footnoted by the Fifth Circuit at 529 F.2d Pages 835-836.

Exhibit 1: Excerpts from the testimony of its injured Flagman, Joseph Price Steed.

Exhibit 2: Excerpts from the testimony of Central's Train Master, C. P. Shell, Jr.

Exhibit 3: Excerpts from the testimony of its Acting Train Master, B. F. Griffin.

Exhibit 4: Excerpts from the testimony of Central's Brakeman, Rufus Eberhart.

Exhibit 5: Excerpts from the testimony of its Engineer, William Acton Russell.

Exhibit 6: Excerpts from the testimony of Central's Conductor, Andrew McClendon.

Exhibit 1

Introduction of the Entire Proceedings in the State Court Trial of Central v. Steed, 287 Ala. 64 and Selected Portions of the Testimony of Joseph Price Steed, Central's Injured Flagman as Excerpted Therefrom.

SOURCE: Appendix in Appeal No. 74-3157, Pages 62, 66-67.

THE COURT: * * *. The state court transcript and all the exhibits are received in evidence subject to Mr. Clark's right to

move to strike any part as we go along. * * *. MR. SHARP: This is the transcript of the trial of the case that was tried several years ago in the Jefferson County court house where Mr. Steed was suing the Central of Georgia Railway and Mr. Steed, of course, was the man that lost a leg in this accident and part of another leg, and I now read from the transcript.

* * * * * * *

* * * *JOSEPH PRICE STEED, being called as a witness for and in his own behalf having been first duly sworn to speak the truth, the whole truth and nothing but the truth upon his oath was examined and testified as follows:*

* * * * * * *

Q. Now, will you look at plaintiff's Exhibit Number 2 and state what is shown in that photograph? A. That is the CFP track at the Riegel Textile Corporation.

Q. All right, now, I will ask you if that photograph shows the general conditions of the track as it was on December 30, 1966 when ya'll went in there to switch the plant? A. Yes, sir.

Q. And look at plaintiff's exhibit number 3, and I will ask you what is shown in that photograph? A. Yes, sir, that is still the CFP track.

Q. *Is that about the way that track appeared on December 30, 1966?* A. *Yes, sir.*

Q. Look at plaintiff's Exhibit Number 4. What is shown on that? A. Still the CFP track.

Q. *Does that show it the way the track appeared on the day you got hurt?* A. *Yes, sir.*

Q. Look at plaintiff's Exhibit 5. What is shown in that? A. That is still the CFP track at Riegel.

Q. *Does that photograph show the track and the platform as it appeared on the day that you were hurt, December 30, 1966?* A. *Yes, sir.*

Q. Look at plaintiff's exhibit number 6. What is shown in that? A. That is further down on the CFP track.

Q. *Does that photograph show the condition of the track at the time you got hurt on December 30, 1966?* A. *Yes, sir.*

Q. What about plaintiff's exhibit number 7? A. It is still the CFP track.

Q. *Did the track—did the rails and the ground around the track appear about like that on the day you got hurt?* A. *Yes, sir.*

• • • • • • • •

(Emphasis Supplied)

Exhibit 2

Excerpts From the Testimony of Central's Train Master, C. P. Shell, Jr.

SOURCE: Appendix in Appeal No. 74-3157, Pages 91-96.

Q. All right, sir. Now, with reference to the condition of the track and to the condition of the roadbed, let me ask you, sir, if you have seen that track in that condition prior to December the 30th, 1966? A. Yes, sir, I have seen it in worse condition than this.

• • • • • • • •

Q. All right, sir, did you, at any time, as trainmaster or not, request the Central of Georgia to repair this area in here on the CFP track? A. I did not request the railroad to.

Q. All right, sir, did you report it to anyone with the railroad? A. Yes, sir, to the agent,Mr. Strickland.

• • • • • • • •

Q. Looking at Plaintiff's Exhibit Number 5, can you point out on there any condition that, in your opinion, would likely or probably cause a car to derail? A. From the picture?

Q. From your looking out right here? A. Yes, sir. Personally I wouldn't think it would be anything like that that would cause the car to derail.

Q. So that insofar as what is shown on plaintiff's Exhibit Number 6, your opinion, as to the condition of track would be that it would be reasonably safe to move cars at a speed of two or three miles an hour? A. Yes, sir.

Q. And that is the speed that they moved the cut of cars into that CFP track, isn't it, Mr. Shell? A. Yes, sir. Normally, yes, sir.

Q. As trainmaster, if you saw that condition as shown in that picture, knowing that the cut of cars was moving two or three miles an hour, you wouldn't register any protest that that was an unsafe condition, would you? A. Not that condition, no, sir.

Q. As shown in that picture? A. No, sir.

Q. Well, let's look at the others then to make sure. Looking at plaintiff's Exhibit Number 7, I would ask you with respect to that picture if there is any condition shown in that picture that would, in your opinion, likely or probably cause a car to derail at a speed of two or three miles an hour? A. I don't see anything that would make it derail.

Q. All right, sir. Now in plaintiff's Exhibit Number 3, I will ask you, without repeating it in detail, the same question with respect to that picture, please, sir. A. No, sir, I see nothing there.

Q. I believe I asked you with respect to five or six, and that is number two. A. What I can see of it, I don't see anything wrong.

Q. As a trainman that is holding on to the side of a car, the lead car of a cut of cars as it is moving, as he is moving along on the side of that car, in the proper handling of his duty he would be looking ahead at when he is going to couple to and would be looking at the track ahead of him, wouldn't he, sir? A. Yes, sir.

Q. And that would be especially true where the operation is in an industry, would it not, sir? A. Yes, sir.

* * * * * * *

Q. You stated that on some occasions, two or three, you made a report to somebody about the condition of the track out there at the Riegel Plant? A. Yes, sir.

Q. Do I recall your testimony correctly? A. Yes, sir, to Mr. Strickland.

Q. *When was the condition that existed about which you made a complaint?* A. *There was one time I definitely remember that there was that dirt, and rocks, and tracks, and all was froze on the track.*

Q. It was during freezing weather? A. It was during freezing weather, and it was all on top of the rails and I told him that I wasn't going to let the engine and cars go in there until they cleaned it off.

Q. And what—you say it was frozen and on top of the rails? A. Yes, sir.

Q. *And the unsafe feature of that condition was the fact that it had the rails covered, wasn't it, Mr. Shell?* A. *That is right, yes, sir.*

Q. *That was one condition. And, now, what others?* A. *That is one that I remember, not allowing the engine to go in there until they cleaned it off. I definitely remember that one time.*

Q. *And that condition was corrected, wasn't it?* A. *Yes, sir, it was corrected that day before they went in there.*

Q. *There is no rule the company—there is no rule of the company that would prevent the train crew, where they see a rail covered with dirt and debris, from stopping operations until that condition is corrected, is there, Mr. Shell?* A. *Not if they think it is unsafe.*

Q. If the members of the crew think it unsafe, that is right, isn't, sir? A. Yes, sir.

Q. *And so, in the normal and practical operation of a railroad, and you have to be dependent somewhat on the report of the train crew as to what is a safe condition, and what is not, don't you, Mr. Shell?* A. *Well, I have to say they have to use their own judgment a lot.*

Q. That is right, sir, and it would be from the persons that are operating on the track that will give you the information, as the trainmaster, as to whether a condition is unsafe or not, wouldn't they? A. Yes, sir.

Q. Now, Mr. Shell, all questions which Mr. Sadler has been asking you about five feet of dirt on the rail, of course, is prefaced on something which he said he is going to prove later. Now, these pictures—I am showing you now plaintiff's Exhibit Number 6, you say that, in your opinion, there is nothing on the rails in plaintiff's exhibit number 6 that would cause a derailment, is that right, sir? A. Yes, sir, that is my opinion.

Q. So, then, if you were a trainman, or if you were the man acting as flagman—well, I will ask you that this way: In your judgment, looking down that track there would be no reason to stop the movement for fear of a derailment, is that correct? A. No, sir.

* * * * * * *

Exhibit 3

Excerpts From the Testimony of B. F. Griffin, Central's Acting Train Master

SOURCE: Testimony adduced from Griffin as taken from the Transcript of the State Court trial, Central of Georgia v. Steed, 287 Ala. 64, introduced with the testimony of other witnesses and all proceedings in the trial of this case and as shown in the Appendix, Appeal No. 74-3157, Page 62; also as set out in the Appendix in Appeal No. 72-2609, Pages 93 and 94 taken from the State Court Transcript, Pages 379, 390-393, and his testimony ore tenus in the trial of the instant case and as reproduced in the Appendix in Appeal No. 74-3157 at Pages 188-201, 203-205.

Q. *Now, as the scene of the CFP track as pictured there in Plaintiff's Exhibit 4, as you looked down that track, would you, based on your experience, see anything there that might cause a derailment?* A. *No, sir.*

* * * * * * *

Q. Mr. Griffin, some reference has been made here to Plaintiff's Exhibit 4. I will ask you to look at that. There has been testimony by you and by others that there is no condition shown on there that might cause a car to derail, and the picture speaks for itself, but is there not some conditions shown over here on the right where it looks to me like the top of the rail is covered up? * * *. A. Well, on one little spot—there is one little spot that is covered over on the right rail, that looks like maybe eighteen inches, in which you can't see the rail.

Q. Yes, sir. From an examination of that picture, can you say definitely one way or the other whether that might or might not cause a derailment? A. Well, if I was going in myself, I would say it wouldn't.

Q. Sir? A. If I was going in myself, I would say it wouldn't.

* * * * * * *

Q. *Incidentally, about that general situation out there, it is true, is it not, that the distance from the CFP track and the coal track toward the front of the platform is approximately forty feet?* A. *I would say so.*

Q. All right. A. From track to track?

Q. From track to track? A. Yes, sir.

Q. *And as I understand it, the distance from the north end of the platform back to the gate is approximately 150 feet?* A. *Probably that far.*

* * * * * * *

Q. And when you got to the gate, it was light enough so that you could see on down to where the car was against the platform, couldn't you? A. I believe there was some obstruction there on that side, the platform side. From the gate I don't believe you could see that far.

Q. But the point I am making is you had a good view down the track. Here is a picture taken from behind the gate? A. When you put cars in there and stand right there at the gate and looking down, I don't believe you could see the derailed car. You may could.

Q. *But in that picture, assuming the cars are not there, you could see what condition the roadbed was in?* A. *You can see the tracks, yes, sir.*

Q. *You can see the track from as far back as the gate, can't you?* A. *Yes, sir.*

Q. *And using that picture as a kind of a test, at this point here on the coal track, you can see down there because this is just about ten feet over there?* A. *Yes, sir.*

* * * * * * *

Q. Do you have a judgment as to whether or not a person on a car or on the ground at the point at the gate on the coal track could see down to the north end of that platform where you say you saw dirt and debris? MR. SADLER: I object to that. THE COURT: Sustain. Q. Could you yourself see it after it was pulled out? MR. SADLER: I object to that. THE COURT: Sustain.

* * * * * * * *

Q. *In your judgment, standing at this gate and on the coal track, how far could you see conditions on the track down to the south? MR. SADLER: I object. THE COURT: Sustain.*

Q. *It was the duty, was it not, of the conductor to go along with the train even when he was on the coal track and observe all conditions on all tracks which might make it unsafe? MR. SADLER: I object. THE COURT: Sustain.*

Q. I will show you plaintiff's Exhibit 1 and ask you to state whether or not that picture shows the extent to which a person could see under daylight conditions from the gate up there down the CFP track? MR. SADLER: I object. THE COURT: Sustain.

* * * * * * * *

Q. I will show you plaintiff's Exhibit 5 and ask you if your opinion is that picture, based on your knowledge of the situation out there, the general location, if that picture is not taken from a point behind the gate and to the west of the CFP track? * * *. A. I would say the picture was taken standing inside the gate probably between the two tracks looking in a southward direction.

Q. All right, this is plaintiff's Exhibit 1? A. Yes, sir.

Q. In your judgment, how far back was that picture taken? MR. SADLER: How far back from where? Q. How far back from the north end of the platform that shows in there? A. Well, it is fairly close—from the platform, probably 150 or 175 feet, I would guess.

Q. All right. And that is almost back to the gate? A. I would say he was standing pretty close to the gate between the track.

* * * * * * * *

Q. All right, getting back to plaintiff's Exhibit 1, is that taken at a point north of the gate? A. I believe he would be standing possibly in between the gate or maybe just a little north of the gate on the CFP track. Somewhere there by the road crossing.

Q. *Now, do you have a judgment as to the opportunity the members of the train crew had when they were at these points I have indicated to see the condition of the roadbed of the CFP track down to the north end of the platform? MR. SADLER: I object to that. THE COURT: Sustain.*

Q. All right, sir, the pictures would reflect the opportunity, would it not, sir? MR. SADLER: I object to that. THE COURT: Sustain.

Q. You heard testimony here, and prior to this movement being started, this area was clear of boxcars anyway, wasn't it? A. According to the conductor's testimony, it was.

Q. All right, is it not correct whenever that conductor was at this switching point here, he could see clear down past the north end of that platform? MR. SADLER: I object. THE COURT: Sustain.

Q. Can you tell the jury anything that would have prevented the—assuming these tracks were not loaded, the CFP track was not loaded with cars, anything that would prevent any member of the switching crew to see down beyond the north end of the platform? MR. SADLER: Objection. THE COURT: Sustain.

* * * * * * * *

Q. *You are familiar with the operating rules relating to conductors that they and trainmen must inspect the running gear and also that they must maintain a lookout when moving for any*

conditions affecting the safe movement of their train. A. *That is absolutely correct.*

* * * * * * *

Q. *What was the practice and custom in your division in 1966, December, with reference to the conductor maintaining a look-out?* * * *. A. *The conductor under the rules and working conditions would observe all moving equipment whether riding on it or standing on the ground of any dragging of brake rigging or any unsafe condition affecting the movement of the cars.*

Q. *How about conditions of the track?* A. *Also any conditions he might see affecting the movement of the cars on the track or that would effect a car going down the track: Yes, sir.*

Q. Well, you heard about the movement of this train and you get down here at a distance of forty feet approximately on the coal track from the end of the platform, is that correct? A. Approximately.

Q. Now, where is the engineer and conductor and trainman, where do they walk or ride when you are going down the coal track? MR. SADLER: I object to that. THE COURT: Sustain.

Q. Well, based on your knowledge of how to conduct a switching operation on that coal track, where would they have been positioned? MR. SADLER: I object. THE COURT: Sustain.

Q. Does the conductor get inside the cab and shut himself up? MR. SADLER: I object. THE COURT: Sustain.

Q. Does he work out in the open where he can look around and discharge his obligations according to the rules that you just mentioned to maintain a look out? MR. SADLER: I would object to that. THE COURT: Sustain.

Q. Mr. Griffin, based on your own knowledge, how that switching operation had to be conducted that you have heard described here and having done it yourself in the capacity of a

conductor, switchman, brakeman and flagman, is it not your own opinion that all members of that train crew had ample opportunity to have a reasonable view of the condition of the track before they entered on the CFP track on the day of this accident? MR. SADLER: I object. THE COURT: Sustain.

Q. Based on your knowledge of that type of operation, can you tell the jury anything that would have prevented the conductor, the flagman, the brakeman, * * * *and even the engineer from seeing any conditions on the CFP track on the day of this accident* * * *? *MR. SADLER: I object. THE COURT: Sustain.*

* * * * * * *

Q. It is true, is it not, that on the occasion of this accident this rule was in force and effect and I will read Rule 894: "Engineman must and fireman when duties permit will keep a constant and vigilant look out, carefully note all signals" and I will stop right there and ask yo : if the use of the walkie-talkie is a form of signal used in railroad switching? A. Yes, sir.

* * * * * * *

Q. Now, I will also ask you if there was not in force and effect at the time of this accident in December, 1966, Rule 896 which reads, "During foggy or stormy weather must not attempt to recover lost time. Must take extra precautions both at switches and at all places where authority to proceed depends on signals". That was the rule, wasn't it? A. Yes, sir.

* * * * * * *

Q. Under what conditions in December, 1966, according to the operating rules of the Central of Georgia Railroad were employees required to take extra ordinary precautions? MR. SADLER: I object. THE COURT: Overrule. A. During fog or stormy weather.

Q. How about "at all places where authority to proceed depends upon signals"? A. Well, he would be complying with the

signal that he received in which he would be cautious of the other rules involved.

* * * * * * *

Q. Do you know the reason why there is this requirement of taking extra ordinary precaution when proceeding on signals? MR. SADLER: I object. THE COURT: Sustain.

* * * * * * *

Q. This was a situation and a place where the authority of the engineman to proceed depended upon a signal, is that correct? A. That is correct.

Q. The signal coming over a walkie-talkie radio? A. That is correct.

Q. And in that connection there was a special requirement in the rules, was there not? MR. SADLER: I object. THE COURT: Sustain.

Q. This was a regulation not only in the rule book, but posted on the bulletin board and preached at safety meetings, and I read from the affidavit, "when moving a train, engine or cars by radio communication and contact is lost with employee directing the movement, the movement must be stopped until communication is restored or other signals are used to complete the movement". * * * A. Yes, sir.

Q. That rule that I have just read was amplified by another rule, was it not, printed in the book and also preached to the enginemen at safety meetings and communicated to engineers in various ways which provides as follows: "When communication by radio is used in lieu of hand signals to perform switching—" that is what they were doing out there? A. Yes, sir.

Q. "Or in backing or shoving a train—" They were shoving it backward, were they not? A. Yes, sir.

Q. "Engine or cars, person directing the movement, will keep constant contact with the person receiving the instructions" and the engineer was receiving instructions? A. Yes, sir.

Q. "If there is doubt as to the meaning of the instructions or for which such instructions were intended, movement will be stopped promptly and will not be resumed until instructions are fully understood. If constant contact is not made, this must be construed as a stop signal". MR. SADLER: Is the question is that a rule? MR. CLARK: Not only a rule, but preached at safety meetings. THE COURT: All right now, put the question.

Q. In addition to that appearing in the rule book—about the rule book, they distributed it to the engineers? A. Each man affected by the rules was furnished a copy.

* * * * * * *

Q. And is it not correct that in the rule classes and at safety meetings, this radio communication rule requirement to stop when you lost communications was stressed? A. Yes, sir.

* * * * * * *

Q. Well, there is nothing in the rule book and nothing on the bulletin board and nothing preached at the safety meetings and nothing lectured at these rule classes that says you can take a margin of one car and not do anything, let it roll one car, is there? MR. SADLER: I object. THE COURT: Sustain.

Q. Where in the rule book can you point out that there is any relaxation of the two rules I have just read such as you have described? MR. SADLER: I object to that. THE COURT: Overrule.

* * * * * * *

THE COURT: The question is is there any other rule which relaxes the rule Mr. Clark has referred to? A. No, sir. * * *

Q. All right, sir, and to relax it to the extent of allowing the train to drift one car length at three miles an hour would not be taking extra-ordinary precaution as required by Rule 896, would it? MR. SADLER: I object. THE COURT: Sustain.

* * * * * * *

Q. • • • You heard the testimony of Mr. Russell read to the fact that he could stop the train in a certain, I believe, five feet at a speed of two or three miles an hour under those conditions that existed there? A. Yes, sir.

Q. Is that also your opinion? A. I have no reason to doubt it.

Q. So, in rolling forward two car lengths, according to your standard and opinion, would come out of communication and a car length averaging eighty feet, you are going 75 feet beyond the stopping distance, is that true? MR. SADLER: I object to that.

Q. Two cars put together. Do you agree that a railroad car averages forty feet? A. Yes, sir.

• • • • • • • •

Q. *Assuming for the purpose of answering this that this train rolled forward at a speed of two to three miles an hour two car lengths during which there was complete silence of that radio talker, walkie-talkie, would this not constitute the car moving forward approximately eighty feet?* A. *Yes, sir.*

Q. *All right. And you have just stated that if the brakes were applied, it can be stopped in five feet, is that correct?* A. *That is correct.*

Q. Under those conditions, if you assume that the car was out of communication—the engineer was out of communication for this distance of eighty feet, before the interval ended of two car lengths he had 75 feet he would have stopped? MR. SADLER: I object to that. • • • THE COURT: Overrule. A. That would be correct.

Q. So, further indulging in that assumption which is for the jury to decide one way or the other, if the railroad—if the engineman was out of communication for this distance but immediately upon getting out of communication or during the first part of it, he had applied his brakes he could have stopped 75 feet, 60 feet, 50 feet short of where you found the car de-

railed? MR. SADLER: I object to that. THE COURT: Sustain.

Q. I had asked you about braking distance at this speed and I believe you agreed with the engineman's statement he could stop in five feet under these conditions. I lay that as a predicate for the next question. That would be switching without air brakes, wouldn't it? A. I disagreed with him but I have no reason to doubt that he couldn't stop.

Q. Well, under these conditions that existed out there, is there any requirement—was this train—engine equipped with air brakes? A. Yes, sir.

• • • • • • • •

Q. *All right, in your investigation, did you find the air brakes were on at the time of this switching operation? • • •* A. *I don't recall whether the air brakes were on the car or not.*

Q. *Well just to refresh your recollection.* A. *According to the report they were switching without air brakes.*

• • • • • • • •

Exhibit 4

Excerpts From the Testimony of Central's Brakeman, Rufus Eberhart.

SOURCE: Appendix Appeal No. 74-3157, Pages 98-104.

Q. *Had you ever noticed anything wrong with any of the tracks, either the coal track or the CFP track in the Riegel Textile Plant?* A. *Well, I have went in there and some of the cabs, or push buggies, or whatever you call them would be pushed off the platform down onto the track. I have been in the coal track where water washed dirt and covered the track and we had to clean it off.*

• • • • • • • •

Q. Insofar as push buggies are concerned, you would have to stop? A. *And get them off the track.*

Q. Call someone to get them off? A. *That's right.*

Q. Whenever you went in • • • and there was mud and gravel or anything on the track, dirt, you could see it? A. *That's right.*

Q. That is part of your job, to see it, wasn't it? A. *That's right.*

Q. You say on some occasions you had seen it, and had stopped the train. A. *That's right, and cleaned the track off.*

Q. That is to avoid any derailment, wasn't it? A. *That's right.*

• • • • • • • •

Q. On many occasions, you went in right ahead of the train walking, didn't you? A. Yes. I wasn't walking. I was on the lead car.

• • • • • • • •

Q. You would go in there two or three miles an hour? A. Yes, sir.

Q. You can walk that fast, can't you? A. Oh, yes, sir.

Q. Actually, on the occasion that Mr. Steed was hurt, he had three ways he could have gone in there? One was with the walkie-talkie riding on the lead car, number two was walking on the platform along side the train, and number three was walking on the tracks themselves, out in front, would that be correct? A. Yes, sir, he could have walked out there, but a moving train behind him——

Q. Would be dangerous? A. That's right.

Q. So, the two safe ways to do it—the safest way would be get on the platform, wasn't it? A. Yes, sir.

Q. Well, now, you, yourself, have, on many occasions acted as flagman going into that same plant? A. Yes, sir.

Q. And going onto Track CFP? A. Yes, sir.

Q. Did you ever ride in there? A. *I have rode in there, but I catch a long ladder and get up above the platform, ride above the platform.*

Q. I see. What would be the purpose of doing that? A. *If anything should happen, that would keep you from getting pinned between the platform and the cars.*

Q. You would clear the platform, wouldn't you? A. *You would clear it if you were up over the platform.*

Q. If you stood on the bottom sill of the ladder, you would not clear the platform? A. *No, sir. It would side swipe you then.*

Q. That is, if there was a derailment? A. *That's right.*

Q. Or if you leaned out too far, or something? A. *That's right.*

Q. And they are constantly preaching to you all about safety on the railroad? A. Yes, sir.

Q. And did the Central of Georgia have meetings about safety? A. Yes, sir.

Q. Did they have any discussion in these meetings about the advisability of riding high enough on ladders when you would ride the lead car in to avoid any obstructions close to the track? A. Yes, sir, there would be instructions for safety all the time.

Q. Well, assuming Mr. Steed was on the bottom sill—is that what you call the lowest rung of the ladder? A. Yes, sir, short ladder is what we call it, short ladder.

Q. Is there another ladder next to it? A. There is one on the other end, on the trailing end of the car. Your short ladder is on the front end and the long ladder on the back end.

Q. I see. Well, now, if you are on the short ladder, can you climb up high enough on it to get away from that platform? A.

Not hardly. One step is way down. You don't have but two steps on it.

Q. *But on the ladder at the back of the car, you can get high enough?* A. *You can get up above the platform.*

Q. *And still see ahead, though?* A. *Oh, yes.*

Q. And still switch? A. Oh, yes.

Q. *And you, yourself, made it a practice when you rode a car into the CFT, a lead car, to get up on the long ladder?* A. *Yes, sir.*

Q. Did you ever go in there with a walkie-talkie? A. Yes, sir.

Q. How does that work? A. All right, you just contact the engineer and tell him what you want to do, and how fast, if you are going too fast, and slow down, and all like that, and tell him about how far you are to another car.

Q. Talk like on a telephone? A. That's right. If anything is on the track, stop him. Tell him something is on the track.

Q. Do you count off the car lengths? A. Yes, sir.

Q. What is the purpose of that? A. Just to give him a chance to check his speed. Just like two or three cars from coupling, you tell him about three car lengths.

Q. All right. A. And he checks his speed to keep from running into the cars.

* * * * * * *

Q. How far back would you—say you were a short distance—you were six car lengths away, would you count off from six? A. Yes, sir.

Q. *How would you count on that walkie-talkie?* A. *Just tell him you like about six cars. Maybe you roll about two cars, about three, two, one, slow moving, like about a car length.*

Q. *The closer you get, do you count them off more?* A. *Yes, sir.*

Q. *Why is that?* A. *That is to keep from running into the car, and give the engineer control of his braking power.*

Q. *It would not be unusual to miss calling a car at five or six or eight lengths back, but when you get it down to three, two and one, that is when you really communicate?* A. *You slow him down before you get too close.*

Q. You do? A. Yes, sir.

Q. *I see.* A. *Tell him to slow along until you can see about a car and a half, maybe two car lengths, and he slows it down and you go up and couple it without tearing up anything.*

Q. Well is there—do you all ever talk about being out of communication? Have you ever heard that expression in railroading? A. That's right.

Q. Would that have something to do with a walkie-talkie? A. That's right.

Q. *What is your understanding of being out of communication?* A. *Well, he can't hear me or nothing, I got out where I can see him and stop him and then go tell him what the trouble is.*

Q. *Suppose you didn't hear anybody and you are having to depend on that walkie-talkie?* A. *If he is out of commission and the engineer don't hear something, he is going to stop until he sees somebody.*

Q. *At three car lengths?* A. *Yes, sir, stop as quick as he can. If he don't see nobody, or nobody don't give no signals, he is going to stop.*

Q. He is supposed to stop if he don't get communication? A. The thing about it, if he can't get no communication, he is going to stop.

Q. Right then? A. To get signals or communications or something. He ain't going to keep coming back. He has got to stop until he gets signals or some kind of communication.

Q. *If you counted down six car lengths, five car lengths, four car lengths, three car lengths, and the man on the walkie-talkie doesn't say anything else, does the engineer stop then?* A. *Yes, sir, he is supposed to stop if he don't get some communication or some signals.*

* * * * * * *

Q. After the accident, did you go down there where the derailment occurred? A. Yes, sir. I come down off the car and I looked around there and I seen this car was leading to the platform and I knowed something happened. * * *

* * * * * * *

Q. Did you all look at it, at the track bed then? A. No, sir, I didn't look at it. I was all tore up about him getting hurt and looking at the blood and stuff.

Q. It wasn't your job to make an inspection of it anyway? A. No.

Q. *Did you look at the rails, though?* A. *I looked at the rails after we come out of there.*

Q. *Did you see any unusual thing on the rail?* A. *No, sir, I didn't see anything to cause it to get off, unless there was something down in there between the rails that could have made the wheels mount the track.*

Q. *You didn't see that, though, did you?* A. *No, sir.*

Q. You were interested when you pulled out of there because an accident happened that hurt one of your friends? A. That's right.

Exhibit 5

Excerpts From the Testimony of Central's Engineer, William Acton Russell

SOURCE: Appendix Appeal No. 74-3157, pages 87-88, 123-128.

WILLIAM ACTON RUSSELL, called as a witness on behalf of the plaintiff, being first duly sworn to speak the truth, the whole truth and nothing but the truth, upon his oath was examined and testified as follows:

* * * * * * *

Q. Now, Mr. Russell, if you will just tell us, in your own words, what happened from the time you coupled to these cars that you left sitting here on the road crossing until the time you brought your engine to a stop here in the CFP track, just tell us what happened, please, sir? A. Well, after we coupled up, Mr. Steed gave me a signal by radio contact to come ahead, and he said 'About five or six car lengths.' I started moving and he said 'five car lengths' and a little bit he said 'four car lengths' and he says, come on like you are coming, about three car lengths, and that is the last I heard.

Q. All right, sir, did you bring your engine to a stop here in the CFP track? A. Yes, sir.

Q. *What caused you to bring it to a stop?* A. *Well, the rule requires us to stop when communication stops, and after he said "Come ahead about three car lengths" I went approximately two and stopped because I didn't hear any more.*

* * * * * * *

Q. In your judgment, how fast was the train being moved into the plant when Mr. Steed got hurt? A. Two or three miles per hour.

Q. That would be a safe speed for that particular stretch of track, I assume? A. Yes, sir. * * *

Q. *Let me ask you something about your ability to stop a train such as the one that you were engineer on when Steed got hurt. When you are traveling at a speed of two to three miles per hour, and on a grade such as you were on, is there some given distance at which you can bring it to a stop after some warning or after you start out to stop it?* A. *What distance would I run?*

Q. *Yes, sir.* A. * * * *I imagine I went four or five feet after I applied the brakes, engine brakes, before I stopped at that speed with those four cars* * * *.*

Q. *Yes, sir. So, on this particular occasion when you set out to stop the train, it is your judgment you stopped it within four or five feet?* A. *That's right.*

Q. *Well, now, you said something about the walkie-talkie playing out. What did you mean by that?* A. *I lost communication with him. He quit talking to me.*

Q. *Well, as I understand it, you had gotten some indication that you had three cars to go, and you had judged you had gone two car lengths and this was since you had last had any communication over the walkie-talkie?* A. *That's right.*

Q. *And then, what prompted you, or what caused you to bring the train to a stop?* A. *It is in the rules.*

* * * * * * * *

Q. I would gather from that, then, it is a responsibility of a flagman to keep talking as you edge up on something, because the closer you get, the more control the engineer must have on the train? A. Yes. He says to me about six car lengths, and then he told me about five, then he told me about four, and he says come on like you are coming about three, and that is the last I heard.

Q. So, when he didn't say come on two car lengths, that was something missing then? A. That's right.

Q. And, then, when he didn't say come on one car length, then you made up your mind well, I am out of communication? A. He didn't say one car length.

Q. I say when he didn't say that? A. Yes, that's right.

Q. *The first notice of anything you had that was unusual when—was when he missed two, come on two car lengths?* A. *That's right.*

Q. *And then, or it was when you heard nothing about come on one car length, you were conscious of the fact that you were out of communication, is that correct, sir?* A. *Abiding by rules, yes, sir.*

Q. *By the rules, you are not supposed to be out of communication for two car lengths, where they have been calling them six, five, four or three?* A. *According to the rules, we are not* * * *.*

* * * * * * * *

Q. So, the closer you get to the coupling point, the more communication you are supposed to have? A. Yes, sir.

* * * * * * * *

Q. What would be the reason for staying in communication? A. I couldn't see where I was going. He is my eyes out there.

Q. *And, in this instance, the lack of communication was such that it alarmed you to the point you finally put it on and stopped it?* A. *That's right.* * * *.*

* * * * * * * *

Q. Mr. Russell, Steed was a trainman on your crew, was he not? A. Yes, sir.

Q. And a part of his duties as a trainman on the ground would be to observe the condition of the track, would that be true? A. Yes, sir.

Q. And, insofar as that movement of the crew was concerned, Mr. Steed was really in charge of the movement going into that

track, would that be true? A. He was in communication with me. He and I had it.

Q. He was relaying instructions to you relative to the movement of that cut into the track, and as you related, he called out six car lengths, five car lengths, and got down to three car lengths and said come on as you are coming? That's right.

Exhibit 6

Excerpts From the Testimony of Central's Conductor, Andrew Thomas McClendon.

SOURCE: Appendix Appeal No. 74-3157, pages 114-120.

* * * * * * * *

Q. Well, now, when you were switching on the coal track, were you on the east side of the train? A. Yes, sir, I was still on the east side.

Q. Is there anything between the coal track and the CFP track? A. No, there is nothing. Ain't nothing.

Q. Any buildings, or anything? A. There is a boiler room down there.

Q. The boiler room would not have cut out your vision would it? A. No.

* * * * * * * *

Q. What would be the distance between those two tracks where the boiler is located? A. I guess that—oh, I would say about 50 feet, I would say around that, between one track and the other one.

Q. Well, now, is it part of your duty as a conductor to maintain a lookout for the condition of the track at all times, particularly on a switching operation? A. No. Of course, if we see anything, we have occasion to go down that way to see

anything, if I happened to see anything unusual, I would see about correcting it, or wouldn't use it but I didn't see it.

Q. *You saw nothing unusual on this occasion?* A. *No, sir.*

* * * * * * * *

Q. It would have been your duty to report any unusual condition? A. Yes, sir.

Q. And you were there at least two or three times a week, and had been for some weeks prior to the accident happening? A. Right.

* * * * * * * *

Q. You had never seen anything unusual insofar as the track being covered with rock? A. No, I never, not so far as I am concerned. So far as my part is concerned, I haven't.

Q. Well, had you ever experienced any problem in getting the cars to run over the track, insofar as anything on the rails is concerned? A. No, sir, I never had.

* * * * * * * *

Q. Did you see any place for loose rocks to come from? A. No, I never have seen them.

Q. *I understand there had been heavy rains within a period of several hours before this accident occurred. Is that according to your recollection?* A. *I don't know about that. It wasn't raining at the time.*

Q. *Did you see any mudholes, or puddles, or water?* A. *I didn't see anything particularly. I didn't notice anything unusual.*

Q. You have no recollection one way or the other about whether the surface was wet in that area? A. No.

Q. When the accident occurred? A. I don't—not unusual. I wouldn't.

* * * * * * * *

Q. When you were down there during that time trying to help Mr. Steed, did you notice any rocks on the track? A. No, sir, I didn't. * * *

Q. Well, was the car that he had been riding on off the track? A. Yes, sir, it was derailed.

Q. Derailed, I believe you call it. Did you look around to see what may have contributed to the derailing? A. * * * *I had to look out and get the numbers of the cars in order to make an accident report about it, you see, and it is the conductor's responsibility to do that, and the cause of a derailment, or anything like that and I said "unknown". I didn't know the cause of anything.* (Emphasis supplied)

Q. I assume you filed that report? A. Yes, sir, I filed it.

Q. There is a blank there that calls for you to say what the condition of the track is in a derailment situation, is there not? A. There is a place in there that says "cause of derailment". If you don't know, I just put down "unknown", you see.

* * * * * * *

Q. *Well, you were required to look to see if there was anything where you could answer the cause of derailment, were you not?* A. *Yes, but I didn't see anything unusual.* * * * (Emphasis supplied)

Q. In any event, in the discharge of your duties, with reference to making a report and filling out the blank about the cause of derailment, you looked sufficiently to arrive at your own conclusion that you didn't know what caused it? A. Yes, sir, that is right. I didn't know.

Q. *In making that check on the report, you making that judgment of your own, it was based on the fact that you saw nothing unusual?* A. *No, I didn't, not to cause that derailment there.* (Emphasis supplied)

Q. You did not see anything unusual? A. No, sir, I didn't see anything.

* * * * * * *

Q. Well, now, is it a part of the duties of a conductor, when he goes in and out of plants, if he observes any unusual conditions to report it to the trainmaster, or someone connected with the railroad so it can be corrected? A. Yes, sir, if you see anything unusual or unsafe.

* * * * * * *

Q. *Now, then, at any time after the accident, did you get down on the ground, or go under the car and examine the ground to see what may have caused the car to derail? A. I did get down on the ground to see about that derailment to make my report.*

* * * * * * *

Supreme Court, U. S.
FILED
OCT 21 1976
MICHAEL RODAK, JR., CLERK

No. 76-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

RIEGEL TEXTILE CORPORATION, *Petitioner,*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

W. H. SADLER, JR.
1750 First National—
Southern Natural Building
Birmingham, Alabama 35203
Attorney for Respondent

Of Counsel:

W. J. SULLIVAN, JR.
CHARLES E. SHARP
SADLER, SADLER, SULLIVAN & SHARP
1750 First National—Southern Natural Building
Birmingham, Alabama 35203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-441

RIEGEL TEXTILE CORPORATION, *Petitioner,*

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Did the court below properly interpret and apply a contract of indemnity in holding petitioner liable thereunder?

STATEMENT OF THE CASE

The respondent, Central of Georgia Railway Company (Central), is a common carrier operating in the states of Alabama, Georgia and Tennessee. On De-

cember 30, 1966 an employee, J. P. Steed, was injured during a switching operation that was being conducted within the plant of and over railroad tracks owned and maintained by petitioner, Riegel Textile Corporation (Riegel), at Trion, Georgia. At the time of the accident, Steed was riding on the side of a railroad hopper car which derailed due to dirt and debris which Riegel had permitted to accumulate over the rails. Steed was caught between the railroad car and a concrete platform which ran parallel to the track. Steed filed suit against Central in the Alabama courts, basing his action on the Federal Employers' Liability Act, Title 45, U.S.C.A. § 51. Central sent Riegel a notice of the suit and a request to defend, which Riegel chose not to do.

Central, anticipating possible liability to Steed, then filed a third party complaint against Riegel based on a contract of indemnity which was in effect between them. The contract provided, in relevant part, as follows:

> "2. The Tenant (Riegel) will pay for, own, maintain the entire track from the point of switch to the end of the track . . . .
>
> "4. If the Tenant fails to maintain said track in safe operating condition as prescribed by the Railway, the Tenant agrees that the Railway may put it in repair at the Tenant's expense, or may discontinue operating thereover. . . .
>
> "9. The Tenant also agrees to indemnify and hold harmless the Railway from loss, damage or injury from any act or omission of the Tenant, its employees or agents to the person or property of the parties hereto and their employees and if any claim or liability other than from fire shall arise from the joint or concurring negligence of the parties hereto, it shall be borne by them equally."

Riegel then removed the cause to the United States District Court. That court retained jurisdiction of Central's indemnity action against Riegel (on diversity grounds) but remanded Steed's case against Central to the Alabama court. In that court, Steed obtained a judgment against Central, which was affirmed on appeal by the Supreme Court of Alabama. *Central of Georgia* v. *Steed,* 287 Ala. 64, 248 So. 2d 110 (1971) (Pet. App. A-31-A-57).

After Central's liability to Steed was thus established, Central moved in the district court for summary judgment against Riegel. The district court granted the motion, but its judgment was reversed and remanded by the court below (Pet. App. A-24-A-30) on the ground that the district court had failed to provide either a key to the facts which it considered important, or its rationale in granting summary judgment.

On remand, and after a full evidentiary trial, the district court granted Central's motion for a directed verdict and, responding to the prior opinion of the court of appeals, entered full findings of fact and conclusions of law. The court below affirmed (Pet. App. A-1-A-12). A petition for rehearing *en banc* was denied.

ARGUMENT

I

There Is No Conflict of Decisions

Although the petition filed in this case ranges widely among Federal Employee Liability Act cases, they quite literally have nothing to do with the issue here—the interpretation and application of the indemnity agreement between the parties. In essence, the court below held that "if Central was found liable to Steed

in the prior action based upon its nondelegable duty [under FELA] to provide a safe place to work, then Riegel would be liable under the indemnity agreement" (Pet. App. A-9)—that is, that "Riegel's liability to Central, under the indemnity agreement, must be determined by the law making Central liable to Steed" (*ibid.*).

The decision follows an earlier decision by the same court (*Miller and Co. of Birmingham* v. *Louisville & N. R. Co.*, 328 F.2d 73 (1964)), and the decisions of other courts of appeal construing and applying essentially similar indemnity contracts are in accord. See *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F.2d 902 (9th Cir. 1950); *Chicago, R.I. & P. R. Co.* v. *Dobry Flour Mills, Inc.*, 211 F.2d 785 (10th Cir. 1954); *Baltimore & Ohio R. Co.* v. *Alpha Portland Cement Co.*, 218 F.2d 207 (3d Cir. 1955); *Seaboldt* v. *Pennsylvania R. Co.*, 290 F.2d 296 (3d Cir. 1961). Petitioner has cited no cases to the contrary. Moreover, the Georgia courts (the accident occurred in Georgia) are also in accord. *Georgia Ports Authority* v. *Central of Georgia Ry. Co.*, 219 S.E.2d 467 (1975).

Petitioner, referring to the fact that Central was held liable to Steed, asserts that this should relieve it of one-half of the liability under the provision of the indemnity agreement which provides for division of liability when it arises from "joint or concurrent negligence of the parties." The court below, following the decision in *Booth-Kelly Lumber Co.* v. *Southern Pacific Co., supra*, properly rejected the argument, as had the Georgia court in *Georgia Ports Authority* v. *Central of Georgia Ry. Co., supra*. The statement in *Booth-Kelly,*

construing a similar indemnity contract, provides the rationale (183 F.2d at p. 907):

> "Basic in any determination of the meaning of this whole paragraph is an understanding that when the parties contemplated that there might be claims for indemnity they must have been cognizant of the fact that in the ordinary case the occasion for seeking indemnity would not arise unless the indemnitee had himself been found guilty of some fault, for otherwise no judgment could have been recovered from him. That this is typically true is recognized in the comment under Section 95, Restatement on Restitution, as follows: 'In all of these situations the payor is not barred by the fact that he was negligent in failing to discover or to remedy the defect as a result of which the harm was occasioned; in most of the cases it is because of this failure that he is liable . . . .'"

Here, as the court below pointed out, and as the district court had found (Pet. App. A-12)—

> ". . . Central's liability to Steed, as indicated above, was based on its nondelegable duty to provide its employee with a safe place to work.
>
> "Nor was there a jury issue established with respect to negligence on the part of Central which could have come within the 'equal shares' provision of the agreement. It is clear that the accumulation of dirt and debris on the track area for which Riegel was responsible was the cause of the derailment and subsequent injury and that, prior to the derailment, no member of Central's crew, other than Steed, saw or was in a position to see the accumulation which caused the derailment. There was no sustantial evidence from which a jury might have inferred that the engineer was guilty of any negligence which proximately caused the injury. It is additionally clear that there were no

defects in the derailed car which might have caused or contributed to the derailment. There is thus no substantial evidence on any issue from which a jury might have determined that Central was entitled to anything other than full indemnity from Riegel."

II

There Are No Other Bases for Granting the Writ

As indicated above, petitioner seeks by abundant reference to FELA cases to suggest that an interpretation of that Act and its standards is involved here. It *was* involved in the action by Steed against Central, but it has no application whatever to Central's claim against Riegel under the contract of indemnity. The long discussion of FELA cases in the petition (pp. 26-40) is simply irrelevant.

Petitioner also apparently seeks (see petitioner's Appendix A-58-A-85) to have this Court review the record of the two trials and to reverse findings of fact by the district court that have been reviewed and approved by the court below in a unanimous decision. That is not a basis for a writ of certiorari. See *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; *Berenyi* v. *District Director of Immigration*, 385 U.S. 630.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

W. H. Sadler, Jr.
1750 First National—
Southern Natural Building
Birmingham, Alabama 35203

Attorney for Respondent

Of Counsel:

W. J. Sullivan, Jr.
Charles E. Sharp
Sadler, Sadler, Sullivan & Sharp
1750 First National—Southern Natural Building
Birmingham, Alabama 35203